TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1919

No. 9[redacted]314

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS OF JAMES D. LEARY, DECEASED, APPELLANTS,

versus

THE UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Record filed March 7, 1919.

(26,988)

INDEX

UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Richmond, State of Virginia, on the first Tuesday in January, being the seventh day of the same month, in the year of our Lord one thousand nine hundred and nineteen.

Present: Hon. Martin A. Knapp, Circuit Judge; Hon. Charles A. Woods, Circuit Judge; Hon. Henry G. Connor, District Judge.

Among other were the following proceedings, to-wit:

Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, Appellants,

versus

The United States of America, Appellee.

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg.

BE IT REMEMBERED that heretofore, to-wit, on May 20, 1918, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

TRANSCRIPT OF RECORD

Filed May 20, 1918.

THE UNITED STATES OF AMERICA,
Western District of Virginia,—To-wit:

At a Regular Term of the District Court of the United States for the Western District of Virginia, continued and held at Lynchburg on March 22nd, 1918.

Honorable Henry C. McDowell, Judge for the Western District of Virginia.

Among other were the following proceedings, to-wit:

Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, Appellants,
versus
United States of America and L. Laflin Kellogg, Appellees.

In Equity.

MANDATE FILED NOVEMBER 19, 1917.

UNITED STATES OF AMERICA,—ss:

The President of the United States of America,

To the Honorable the Judge of the District Court of the United States for the Western District of Virginia.

(Seal.)

Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Fourth Circuit, in causes between Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, appellants, and The

United States of America and Luther Laflin Kellogg, appellees, No. 1277; and Luther Laflin Kellogg, appellant, and the United States of America, Norfolk & Western Railway Company, and Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, appellees, No. 1278, wherein the decrees of the said Circuit Court of Appeals, entered in said causes on the 12th day of November, A. D. 1915, are in the following words, viz:

Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, appellants,
vs.
The United States of America and Luther Laflin Kellogg, Appellees.

No. 1277.

Appealed from the District Court of the United States for the Western District of Virginia.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court, in this cause, be, and the same is hereby reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Virginia, for further proceedings in accordance with the opinion of this court.

MARTIN A. KNAPP,
U. S. Circuit Judge.

November 12, 1915.

Decree. Filed and entered November 12, 1915.

(2) UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Luther Laflin Kellogg, Appellant,
vs.
The United States of America, Norfolk & Western Railway Company, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, Appellees.

No. 1278.

Appealed from the District Court of the United States for the Western District of Virginia.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Virginia and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the District Court of the United States for the Western District of Virginia, at Lynchburg, for further proceedings in accordance with the opinion of this Court.

MARTIN A. KNAPP,
November 12, 1915. U. S. Circuit Judge.

as by inspection of the transcript of the record of the United States Circuit Court of Appeals, which was brought into the Supreme Court of the United States by virtue of an appeal taken by the United States, whereon Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, Luther Laflin Kellogg and the Norfolk and Western Railway Company were made parties appellees, agreeably to the act of Congress in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and seventeen, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this case be, and the same is hereby affirmed.

AND IT IS FURTHER ORDERED, That this cause be, and the same is hereby remanded to the District Court of the United States for the Western District of Virginia. October 15, 1917.

(3) You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the seventeenth day of November, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

ORDER ENTERED NOVEMBER 19, 1917.

At a stated term of the United States District Court held at Lynchburg, in and for the Western District of Virginia, on the 19th day of November, 1917.

PRESENT: Hon. Henry C. McDowell, District Judge.

The United States, Plaintiff,
Against
Benjamin D. Greene, Luther Laflin Kellogg, the Norfolk & Western Railroad Company, Daniel J. Leary and George Leary, Administrators of James D. Leary, Deceased, Defendants.

Luther Laflin Kellogg and Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, having taken appeals to the Circuit Court of

Appeals of the Fourth Circuit from the final decree of this Court made in this action on December 13th, 1913, and such appeals having been heard, and said Circuit Court of Appeals having made and entered its judgment that said final decree be reversed and the cause be remanded to the District Court of the United States for the Western District of Virginia, at Lynchburg, for further proceedings in accordance with the opinion of said Circuit Court of Appeals, and the said United States having appealed from said judgment of the Circuit Court of Appeals to the Supreme Court of the United States.

Now, on reading and filing the mandate of the Supreme Court of the United States, whereby it appears that the judgment of the said Circuit Court of Appeals is affirm-
(4) ed, and on motion of Abram J. Rose, solicitor for Luther Laflin Kellogg, and Aubrey E. Strode and John T. Coleman, Jr., solicitors for Daniel J. Leary and another, Administrators of James D. Leary, deceased, it is

ORDERED that the judgment of the said Supreme Court and of the said Circuit Court of Appeals be made the judgment of this Court; and on like motion, it is

ORDERED that this case be, and the same hereby is set for hearing and further proceedings and entry of decree or decrees in accordance with said judgments, on the 30th day of November, 1917, at 11 o'clock A. M., at Lynchburg, Virginia.

Foregoing order approved as to form:

MARION ERWIN,
Special Asst. to Atty. General.
Solicitor for Plff.

ABRAM J. ROSE.
Solicitor for Deft. Kellogg.

J. T. COLEMAN, JR.,
AUBREY E. STRODE,
Solicitors for Leary's Admr.

PETITION AND EXHIBITS OF LEARY'S ADMR.

Filed November 30th, 1917.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, AT LYNCHBURG.
IN EQUITY.

The United States of America, Complainant,
Against
Benjamin D. Greene, Luther Laflin Kellogg and the Norfolk and Western Railway Company, Respondents.

UPON THE INTERVENTION OF THE PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES D. LEARY, DECEASED.

Petition of Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased:

The final decree of, to-wit: December 13, 1913, of the District Court in the above entitled cause having been reversed by the Circuit Court of Appeals for the Fourth Circuit by its opinion and decree filed and entered on, to-wit: November 12, 1915, in which opinion and decree (5) of the said Circuit Court of Appeals it was held "that the estate of Leary has established a claim to the stock in question, which is superior to the claim of the United States," which said opinion and decree of the said Circuit Court of Appeals was afterwards, to-wit, on the 15th day of October, 1917, approved and affirmed by the Supreme Court of the United States, and the said judgment of the said Circuit Court of Appeals and of the said Supreme Court of the United States having been made the judgment of the District Court, Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, now petition the District Court in the above entitled cause and represent and pray as follows:

FIRST: It having been finally determined that in and to the fund in this cause, made up of the four hundred shares of stock of the Norfolk & Western Railway Com-

pany, with the dividend, interest and other accumulations therefrom and accretions thereto, impounded in this cause, amounting to a total of more than $72,000.00 in value, the equity and title of the estate of the said James D. Leary, deceased, is superior to that of all other claimants, as more fully appears in the proceedings in this cause, the estate of the said James D. Leary, deceased, is entitled to be fully indemnified and made whole out of the said fund against any and all loss, disbursements, costs and expenses that it may have suffered, made and incurred because of the said James D. Leary having become surety upon the bail bonds in the said proceedings mentioned and more particularly because of this suretyship upon the bail bond of the said Benjamin D. Greene in the penalty of $40,000.00 executed on, to-wit, the 20th day of January, 1902, which said losses, disbursements and expenditures are more fully hereinafter referred to and set out.

SECOND: The said estate properly and seasonably contested liability upon the recognizance forfeited by said Greene, in and about which said contest it made such reasonable expenditures as were necessary to protect the said Greene, the said Leary estate and the said fund in this cause against the establishment of liability. Opportunity to file an itemized list of such expenditures and to support the same by proper proof in due course is prayed.

(6) THIRD: The said Luther Laflin Kellogg by his first answer filed to the bill in the original cause asserted personal claims of his own to the said impounded stock, and allowed the cause to progress to the point where the evidence therein had been taken and it was ready for hearing upon the merits without having offered any evidence to sustain the claim of the Leary estate to a prior equity therein. Of the pendency of this said cause the representatives of the Leary estate did not learn until, to-wit, about the month of January, 1908, and as was said by the Supreme Court, on the first appeal thereto, in its opinion filed, to-wit, May 13, 1912 (224 U. S. page 576):

"As to laches, there is no legal presumption that the petitioner knew of this suit, and still less that she knew

the position taken by Kellogg. He set up that the stock was taken as indemnity to himself for his promise to indemnify Leary, etc., and said nothing about the petitioner's claim. If that claim is well founded, and she knew of this suit, it was not laches in her to assume that Kellogg would do his duty as her trustee."

After ascertaining the pendency and state of the cause, and the failure of the said Kellogg properly to assert the equity of the Leary estate and to protect the trust fund held by him for the indemnification of the said estate, the representative thereof, both to preserve and protect the said fund and to establish and carry out the said trust, was compelled to file, and did file, an intervening petition in this cause, asserting claims against the said fund which have been fully established and allowed by the final judgments aforesaid, as more fully appears in the proceedings heretofore had in said cause. In and about the said necessary prosecution of the said intervening petition the said estate has incurred reasonable and necessary costs and expenses, including counsel fees paid and to be paid, court costs and other necessary expenditures, to establish the said trust and to protect and preserve for purposes of the trust the said trust and indemnity fund, a partial statement of which costs, expenses and expenditures is hereto attached as a part of this petition and reasonable opportunity to complete the same and to offer evidence in support thereof is prayed.

(7) FOURTH: Being compelled so to do by the said United States, and pursuant to judicial proceedings had on the said forfeited recognizance, the said Leary estate paid to the United States of America on the 25th day of July, 1910, the sum of $40,802.00 for which, with interest at the rate of 6 per centum per annum from the said date of payment, the said estate is entitled to be reimbursed out of the said indemnity fund: impounded in this cause.

Petitioners, therefore, show that by virtue of the aforesaid contract of indemnity, pursuant to the final judgments aforesaid, and by reason of the equity of the said estate in the said fund arising from and based upon its successful contest to establish the said trust and to protect and preserve the trust fund to which the United States has established no claim as against the Leary estate, but is entitled to have only such remainder there-

of, if any, as would go to the said Benjamin D. Greene after the satisfaction of the said indemnity and trust claims thereto, petitioners are entitled to have, and petitioners accordingly pray that the said fund, impounded in this cause, may be applied as follows:

(1) To the reimbursement of counsel fees, court costs and other expenditures made or incurred by the said Leary estate in and about its defense of the proceedings by the United States upon the said forfeited recognizance;

(2) To the reimbursement of counsel fees, court costs and other expenditures paid or incurred by the said estate in and about the establishment of the said trust, the preservation and protection of the said trust fund and in securing its application to the objects of the trust;

(3) To the payment to the said petitioners of the said sum of $40,802.00, with interest thereon at the rate of 6 per cent per annum from the 25th day of July, 1910, until the date of payment thereof to petitioners.

Your petitioners further pray that the said United States of America and Luther Laflin Kellogg may be made parties defendant to this petition and required to answer same, though answer under oath is hereby expressly waived; and that petitioners may have all such further and general relief in the premises as the nature
(8) of their case may require or to equity may seem meet.

And they will ever pray, etc.

DANIEL J. LEARY and
GEORGE LEARY,
Administrators of James D. Leary, Deceased.
By Counsel.

J. T. COLEMAN, JR.,
AUBREY E. STRODE,
Counsel.

Service of a copy of above petition acknowledged as of

this day, and general objections are to be considered as filed by the United States to all charges and allowances asked for as against the United States or as against the general fund or the portions thereof to which the United States would otherwise be entitled.

MARION ERWIN,
Special Asst. to the Atty.-Genl.

Nov. 30, 1917.

State of New York,
City of New York—To-Wit:

This day Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, personally appeared before me, a Notary Public in and for the city of New York, in the State of New York, and made oath before me in my said city in due form that they are the duly qualified administrators of James D. Leary, deceased; that the facts stated in the foregoing petition, so far as they are based upon their own knowledge, are true; that so far as the said facts are based upon information derived from others they believe them to be true, and that all of the allegations of the said petition are true to the best of their knowledge and belief.

.....,

.....,
Administrators of James D. Leary, Deceased.

Subscribed and sworn to before me in my said city this — day of ———, 1917.

My term of office expires on the — day of ——— 19--.

Witness my hand and seal of office.

.....,
Notary Public for the City of New York, in the State of New York.
(Seal)

(9) Itemized statement of disbursements made by

Mary C. Leary, administratrix, and Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, to establish the prior equity of the Leary estate in the four hundred shares of Norfolk & Western Railway Co. stock in the hands of L. L. Kellogg in the suit of United States vs. Leary et als.

1910.			
Oct.	28	By amount of expenses incurred H. C. & E.	$ 97.90
Nov.	12	Expenses J. T. Coleman to Richmond to reargue case.	21.00
	26	Paid A. E. Strode amount of expenses incurred by him.	17.50
Dec.	3	Telegram to McClure, N. Y., in reference to argument of case.	.50
	31	Paid J. P. Bell & Co., for printing brief.	40.00
1911.			
Jan.	5	Paid telegram from clerk at Richmond.	.35
	5	Paid telegram to McClure (Dec. 8).	.77
	5	Paid telegram to McClure (Dec. 16).	.50
	5	Paid to H. T. Maloney, Clerk (Dec. 16th).	.25
	5	Paid telegram to McClure (Dec. 16).	.59
	5	Paid telegram From H. T. Maloney, Clerk (Dec. 16).	.29
	27	Paid telegram from Clerk U. S. Circuit Court, Asheville.	.60
Feb.	6	Paid telegram to Clerk U. S. Circuit Court (Jany. 27).	.50
	6	Paid H. T. Maloney, Clerk, for copy Record.	16.45
	14	Paid Clerk Supreme Court U. S., deposit on act costs.	25.00
June	2	Paid A. E. Strode expenses incurred by him to date.	34.70
Oct.	30	To Coleman, Easley & Coleman and A. E. Strode, attys.	1,000.00
Dec.	9	To expenses J. T. Coleman to Washington in connection with appeal.	11.50
1912.			
Jan.	3	For printing brief of motion to affirm.	25.75

May	1—To expenses J. T. Coleman to Washington to argue case in Court of Appeals.	20.00
July	11—To A. E. Strode and Horsely, Coleman & Easley, Attorneys.	1,000.00
Oct.	14—To Clerk U. S. Circuit Court, answer of L. L. Kellogg.	6.35
1913.		
Dec.	30—To postage on brief to Lehmaier & Pellett, Attorneys.	.25
1914.		
Jan.	9—To telegram to and from Marion Erwin in reference to appeal (Dec. 29 and 30).	3.05
Jan.	9—To telegram to Lehmaier & Pellett (Dec. 29).	.75
Mar.	4—To telegram to Lehmaier & Pellett.	.68
Nov.	4—To telegram to Mr. Erwin (Sept. 3).	.50
Feb.	5—To telegram to L. & P. (Mar. 4). . .	.50
	5—To telegram to L. & P. (Feb. 26). . .	.75
Apr.	2—To stenographic work in getting up record for appeal.	5.90
	24—To H. T. Maloney, Clerk, on account deposit for costs.	25.00
	24—Paid J. P. Bell Co., for printing record for appeal.	120.00
Mar.	4—Paid Stanley W. Martin, Clerk, balance fees to him.	58.95
	4—Paid Miss Horner for work in connection with preparation of transcript for appeal.	1.50
May	6—Paid A. E. Strode and C. E. & C., Attorneys.	700.00
Oct.	4—Paid expenses on brief to Clerk Circuit Court of Appeals, Richmond.	.40
Dec.	4—Paid J. P. Bell Co. for printing brief, Circuit Court of Appeals.	31.25
	4—Paid telegrams as follows: From Maloney, Clerk, From Maloney, Clerk, To L. & P. From L. & P.	2.63
(10)	1915.	
Jan.	2—Paid J. B. Bell Co., for printing reply brief.	22.50
Feb.	9—Paid telegram to A. J. Rose, N. Y. . .	.51

May	5—Paid telegram in reference to postponement Leary case as follows:	
	To Erwin.	.76
	To Rose.	.76
	To L. & P.	.39
Apr.	23—Paid A. E. Strode and C. E. & C., Attorneys.	500.00
May	6—Paid expenses J. T. Coleman to Richmond argue case.	21.50
June	22—Paid check to H. T. Maloney, Clerk, to cover balance due for cost over and above deposit.	3.15
Sept.	27—Paid check A. E. Strode, Atty., expenses in connection with argument U. S. Circuit Court of Appeals.	16.50
Nov.	29—Paid check to H. T. Maloney balance for costs, Circuit Court of Appeals.	15.50
Dec.	4—Paid telegrams as follows:	
	From H. T. Maloney, Clerk.	.86
	To George Leary.	.78
	To Daniel J. Leary.	.78
1916.		
Apr.	6—Paid to Rose reference to appeal. . . .	1.59
Nov.	7—Paid S. V. Kemp, executor, act. expenses dues J. D. Horsley.	51.31
Dec.	7—Paid one-half printing bill.	15.30
	8—Paid C. E. & E. cost account on their books.	5.80
1917.		
Sept.	29—Paid A. E. Strode and J. T. Coleman, Jr., Attys.	300.00
Oct.	2—Paid expenses J. T. Coleman, Washington.	33.25
	16—Paid J. P. Bell Co. for printing briefs, Supreme Court of Appeals.	99.00
	. .—Paid A. E. Strode expenses to Washington on Oct. 2nd.	33.25
1912.		
Feb.	21—Paid Frederick Geller to pay American Surety Co. for bond given on appeal to Supreme Court U. S. . .	10.00
1913.		
June	25—Paid Mellun & Prentice in the case of U. S. vs. Green.	135.50

1914.		
Jany. 23	—Paid Globe Indemnity Co., of N. Y., appeal supersedeas bond on intervention of Mary C. Leary.	11.00
Feby. 2	—Paid Lehmaier & Pellett on account services in this proceeding and for expenses incurred by them.	456.80
6	—Paid American Surety Co. for bond.	10.00
Apr. 7	—Paid Demott & Enright.	85.63
1916.		
Jany. 19	—Paid Globe Indemnity Co. premium on appeal and supersedeas bond.	11.00
1917.		
Jany. 19	—Paid Globe Indemnity Co. premium on appeal and supersedeas bond..	11.00
1909.		
Jany. 13	—Paid David McClure for printing, etc.	175.67
Feb. 9	—Paid David McClure for printing, etc.	199.00
Mar. 12	—Paid American Surety Co. premium on bond.	10.00
1910.		
Jany. 13	—Paid American Surety Co. premium on bond.	10.00
1911.		
Jany. 7	—Paid P. M. Brown expense account..	125.00
1911	———Paid P. M. Brown unpaid bill.	151.55
1913.		
Dec. 30	—Paid McClure & McClure, legal services.....	1,690.38
	Total.	

DANIEL J. LEARY,
GEORGE LEARY.

(11) State of New York,
City of New York—To-wit:

This day Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, personally appeared before me, Fred H. Schomburg, a Notary Public, in and for the city of New York, in the State of New York, and made oath in due form that they are the duly qualified administrators of James D. Leary, deceased, and that the above account of expenses incurred by the

estate of James D. Leary, deceased, in the suit of the United States vs. Leary, et als. is a true and correct statement of the amounts expended by and on behalf of the estate of the said James D. Leary up to and including November 30th, 1917.

My term of office expires on 30th day of March, 1919.

Given under my hand this 28th day of November, 1917.

FRED H. SCHOMBURG,
(Seal) Notary Public, King County,
Certificate filed in New York County.

ORDER ENTERED DECEMBER 1, 1917.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

(12) At Lynchburg on December 1st, 1917.

IN EQUITY.

The United States of America, Complainant,
Against
Benjamin D. Greene, Luther Laflin Kellogg and the Norfolk and Western Railway Company, Respondents. } Decree.

The solicitors for the United States, complainant, the defendant, Luther Laflin Kellogg, and the intervenors, Daniel J. and George Leary, administrators of James D. Leary, deceased, being before the Court this day, and having presented arguments upon the form of the final decree to be entered in the above stated cause, and of the provisions thereof in respect to the rights of the several parties, and the Court having taken the said matters under consideration and the solicitors for the respective parties all having conceded that the intervenors will be entitled to receive out of the fund now in Court the sum of at least Thirty Thousand Dollars ($30,000) under such final decree as will be hereinafter entered, now by consent of all parties to said cause, it is

ORDERED AND DECREED that Louis H. Price, the Clerk of this Court, be and he is hereby directed to

issue and deliver to J. T. Coleman, Jr., and Aubrey E. Strode, solicitors for the said intervenors, a check payable to the said solicitors for the sum of Thirty Thousand Dollars ($30,000), drawn on the Lynchburg National Bank, which the said bank is directed to pay out of the funds on deposit in said causes upon presentation of the said check, accompanied by a duly certified copy of this order.

(13) It is FURTHER ORDERED AND DECREED that the payment of the said sum to the said intervenors in manner aforesaid shall be without prejudice to the rights of any of the parties to the suit, and be considered merely as a payment on account of the claims of the said intervenors.

Nov. 30, 1917.

Consented to:

MARION ERWIN,
Special Assistant to Attorney-General.

ABRAM J. ROSE,
Solicitor for Luther Laflin Kellogg.

J. T. COLEMAN, JR.,
AUBREY E. STRODE,
Solicitors for Intervenors.

DECREE OF DECEMBER 10TH, 1917.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

(14) Continued and Held at Lynchburg on December 10th, 1917.

The United States of America, Complainant,
Against
Benjamin D. Greene, Luther Laflin Kellogg and the Norfolk and Western Railway Company, Respondents.

WHEREAS, on December 1, 1917, an agreed order was entered in this cause directing the Clerk of this Court to draw check to J. T. Coleman, Jr., and Aubrey E. Strode, solicitors for the intervenors, Daniel J. and George Leary, administrators of James D. Leary, deceased, for the sum of $30,000.00, and

WHEREAS, on the delivery of said check the Clerk was entitled to a 1 per cent commission thereon, amounting to $300, as provided in Section 828, Revised Statutes,

IT IS ORDERED AND DECREED that the Clerk of this Court be, and he is hereby directed to draw check on the Lynchburg National Bank, at Lynchburg, Va., for the sum of $300.00, payable to Louis H. Price, Clerk of said Court, in payment of said commission, which the said bank is directed to pay out of the funds on deposit in said cause.

IT IS FURTHER ORDERED that the Clerk certify a copy of this order to the Lynchburg National Bank.

Endorsed: December 10, 1917.

Enter HENRY C. McDOWELL,
District Judge.

Entered: December 10th, 1917.

LOUIS H. PRICE, Clerk.

DECREE FOR THE SALE OF STOCKS.

(15) Entered December 12th, 1917.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA.

Term, 1917.

Continued and Held at Lynchburg, Va., on the 12th Day of December, 1917.

Honorable Henry C. McDowell, Judge, Presiding:

The United States of America, Complainant,
Against
Benjamin D. Greene, Luther Laflin Kellogg and the Norfolk and Western Railway Company, Defendants.
and
Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, substituted as such administrators in place of Mary C. Leary, Administratrix, deceased, Intervenors.

Bill.

Intervention.

DECREE FOR SALE OF STOCKS.

In the above stated cause, it appearing that there are in Court, subject to its decree, certificates for 400 shares of the Norfolk & Western Railway Company, numbered C-5896, C-5897, C-5898, 11077 and X-74200, issued in the name of Luther Laflin Kellogg, which were duly transferred in blank by said Kellogg and delivered to the Clerk of this Court under the order of this Court of January 6th, 1914, and under the decree and mandate of the Supreme Court, in this cause, said stock or its proceeds is subject to distribution as the interest of the parties hereto may be determined in this cause by the final decree of this Court, and the parties in interest having agreed that it is desirable that the said stock should be sold at once in advance of a final decree of distribution, it is considered ADJUDGED, ORDERED and DECREED by the Court:

(1) That the Clerk of this Court is directed to transmit by express to the Guaranty Trust Company of New York, 140 Broadway New York City, the said certificates for said 400 shares of stock, for sale by them on the Stock Exchange at current market rates, the proceeds thereof after the deduction of the usual brokers' commission and tax transfer charges, if any, to be transmitted by said Guaranty Trust Company to the Clerk of this Court. (16) That said Clerk shall forward to said Guaranty Trust Company, with said stock certificates, a certified copy of this decree, which shall be good and sufficient au-

thority to the said Guaranty Trust Company to sell said stock represented by said certificates, free from the claims of the said Luther Laflin Kellogg, the United States, the intervenors Leary, and of all other parties to the cause and to account to the Clerk of this Court for the net proceeds thereof as hereinbefore directed. The said Guaranty Trust Company have in their letter of December 3rd, 1917, to A. J. Rose, Esq., stated that their charges in the matter will be only the brokers' regular commission of one-eighth of 1 per cent, which is ordered to be filed.

(2) The Clerk of this Court, upon receipt of the net proceeds of said stock from the said Guaranty Trust Company, shall deposit the same in the Lynchburg National Bank on the same terms under which bank has heretofore been receiving and keeping the funds arising from the income of said stock, subject to the further orders and decrees of this Court.

Consented to:

MARION ERWIN,
Special Asst. to the Atty.-General, U. S.
Solicitor for the United States.

ABRAM J. ROSE,
Solicitor for L. L. KELLOGG.

AUBREY E. STRODE,
J. T. COLEMAN, JR.,
Solicitors for Daniel J. Leary and George Leary, admrs. of James D. Leary, decd.

Endorsed: Decree for the sale of stocks.

Orig. Enter. HENRY C. McDOWELL.

Entered December 12th, 1917.

LOUIS H. PRICE, Clerk.

DECREE.

(17) Entered December 20th, 1917.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

Continued and Held at Lynchburg, on December 20th, 1917.

United States
vs. In Equity.
Benj. D. Greene et al.

This cause having come on again to be heard, was argued by counsel and, upon consideration thereof, it was, for reasons set out in opinion this day filed,

ADJUDGED, ORDERED and DECREED:

First. That Daniel J. Leary and George Leary, administrators of the estate of James D. Leary, dec'd, are entitled to have from the fund in the custody of the Court in this cause, subject to deduction of the sum of $30,000 paid to them under the order of this Court of December 1st, 1917, and subject to the further deduction (under Section 838 U. S. Rev. Stats.) of 1 per cent of the entire amount paid and to be paid to them, the sum of $40,802; also interest on said sum at the rate of 6 per cent per annum from the date on which the personal representative of said James D. Leary paid said sum until payment; also the necessary and reasonable expenses, including reasonable counsel fees, laid out by the said Leary's representative in defending the action brought by the United States against said James D. Leary on the bail bond given by Benjamin D. Greene and James D. Leary and mentioned in the present proceedings.

Second. That the aforesaid administrators do within 15 days from this date file in the Clerk's Office of this Court (and transmit by mail at the same time a copy thereof to Hon. Marion Erwin, 15 William Street, New York City) a detailed statement showing the date of the payment of the judgment on the said bail bond; and the

dates and amounts and the nature of the above-mentioned expenses and outlays.

Third. That said administrators are hereby allowed 30 days after filing said statement within which to take and file depositions in support of their claim; that (18) the United States be allowed the next succeeding 15 days for taking and filing counter depositions; and that rebutting depositions in behalf of either party may be taken and filed within the next succeeding 10 days. And if either party then desires to introduce oral evidence, a day for the hearing will be hereafter fixed by the Court.

Fourth. That the prayer of said administrators that the costs and expenses of the Leary estate in this present litigation should be allowed and paid out of the fund is denied and overruled.

Fifth: That the prayer of L. Laflin Kellogg, Esq., for an allowance out of the fund is also denied and overruled.

Endorsed: Enter.

HENRY C. McDOWELL.

Entered December 20th, 1917.

LOUIS H. PRICE, Clerk.

OPINION.

(19) Filed Dec. 20, 1917.

United States vs. Greene et al. } In Equity.

Opinion.

The opinions of the higher Courts in this litigation will be found in Leary vs. U. S., 184 Fed., 433; Leary vs. U. S. 224 U. S., 567; Leary vs. U. S., 229 Fed., 660; U. S. vs. Leary (Oct. 15, 1917), U. S. Adv. Ops., 1917, p. 5.

THE LEARY CLAIM.

A. The letters in which the contract of indemnity is set forth are reproduced in 229 Fed., 663. It is conceded by counsel for the government and not disputed by Kellogg, that the Leary estate, in settlement of the judgment on the bail bond, paid out $40,802, being principal, interest and taxable costs. Leary's representatives claim now that this payment was made on July 25, 1910, although the claim in the amended bill of intervention is that the payment was made on or about Dec. 31st, 1910. They also claim now that they should be allowed the defendant's costs and expenses incurred in defending the suit on the bond. Seemingly there is considerable weight of authority in support of this contention. See 22 Cyc. 88, 89; 16 Am. & Eng. Ency. (2nd ed.), 182; French vs. Parish, 14 N. H., 496; Berry vs. Slocum, 2 La. Ann., 993; Sims vs. Gondelock, 7 Rich. Law 23; McKenzie vs. Underwood, 21 D. C., 126. In the letter of December 14, 1899, from Kellogg to Leary it is said:

"It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be *established*, that it is to be applied in payment of your obligation." I think that ambiguities in a contract of indemnity should be construed rather liberally in favor of the indemnitee, especially where, (20) as here, the contract was written by the attorney for the indemnitor. In strictness, it may be that the final judgment of forfeiture on the bond in the Court in Georgia "established" Leary's liability; but in common understanding the language above quoted seems to authorize, if not to require, Leary to contest liability when sued on the bond—at least if there appeared to exist a fighting chance of success. Moreover, in contesting the action in New York on the bond, the indemnitee was in some sense acting in the interest of the indemnitor. On the whole it seems to me right that the reasonable attorney's fee and other necessary and reasonable expenses to which Leary's representative was put in contesting the suit on the bond should be held as within the contract of indemnity. I do not think that a formal amendment of the bill of intervention is necessary either in regard to the true date from which interest should run, or in respect to the matter of expenses in-

curred in defending the suit on the bond. Eq. Rule 19. The order to be now made can provide for the taking of evidence on these points.

B. Leary's representatives now also claim that they should be allowed out of the fund the expenses, including counsel fees, to which the estate has been put in the litigation here. This claim is, as it seems to me, clearly not within either the terms or the intendment of the contract of indemnity. The right of the Leary estate to recover is based on the supposition, doubtless true in fact, that Leary had no knowledge that the stock pledged for his indemnity was bought with money stolen from the government. Kellogg has repeatedly stated under oath that he had no knowledge of such fact. There is nothing in the record on which to found an assertion that Greene had, when the stock was pledged, the remotest suspicion that the government would even try to trace any part of his unlawful gains through the many well-covered transfers into the pledged stock. It (21) is therefore impossible to say that any one of the three persons concerned in the making of the agreement of indemnity contemplated and intended to provide for the expenses of a suit by the government asserting a claim to the stock. The one thing that was in the minds of the parties was to prevent such loss to Leary as would or might accrue if judgment on the bail bond should be taken against him. When his estate is allowed the amount of this judgment in full, with interest and costs and his expenses in defending the suit on the bail bond, it will have had all that was intended by the indemnity agreement. However, counsel for Leary's estate contends that the doctrine of implied warranty authorizes the claim. It may be conceded, for present purposes, that Greene should be held to have impliedly warranted the title to the stock, 31 Cyc. 808; 22 Am. & Eng. Ency. (2d ed.), 850. However, the unsuccessful attack by the government on Leary's title to the stock does not constitute a breach of Greene's implied covenant. He did not covenant that no claims to the stock would be made, his covenant was simply that his title was good. It has been adjudicated to be such, in so far as Leary's claim in full is concerned, and I see no reason why, as between Greene and Leary, there should be a right on Leary's part to recover the expenses he was put to in

defending the title. Rawle Covenants for title (5th ed.) Sections 201, 126, 127; Luddington vs. Pulver, 6 Wend., 404, 10 N. Y., Com. Law Rpts., 1139; Bancroft vs. Abbott, 3 Allen (85 Mass.), 524; Brandt vs. Donnelly, 14 Ky. Law Rep., 819; Richards vs. Whittle, 16 N. H., 259. It is true, that if the opponent of the Leary estate here were not the government, the taxable costs of this present suit would be adjudged to Leary's representatives. And such costs would be the full measure of their recompense for outlays in maintaining their title. Groves vs. Sentell, 153, U. S., 465, 486.

It is argued that Leary's estate should be subrogated to the rights of the trustee. If Kellogg is entitled to (22) any allowance, it is because he has by industry, zeal and fidelity earned it. It is his personal recompense. I can see no sort of equity in taking such allowance from him and giving it to his *cestui que* trust. If, on the other hand, Kellogg has not earned the right to an allowance, there is nothing to which Leary's representatives can possibly be subrogated.

KELLOGG'S CLAIM.

A. I find myself unable to see on what principle it can be held that the government, as owner of the remainder of the fund after satisfaction of the just claims of Leary's representatives, should be called upon to pay an allowance to Mr. Kellogg. Allowances are made out of funds in Court as compensation for services rendered to, and as reimbursement for expenditures made in behalf of the beneficiaries. Transfer of the stock certificates was enjoined immediately after the filing of the original bill. See order of December 19, 1903. Consequently from that time until Kellogg surrendered the stock, under the order of December 13, 1913, his services in holding the stock certificates were entirely nominal. From the very beginning of this litigation Kellogg has opposed the demands of the government. Never at any time has he acted as a trustee for the government; he has never performed any service which was intended for the benefit of the government, nor can I see how the government has in any way ever received any benefit from any act of his. It is true that before Leary's intervention Kellogg laid out money in expenses and employed counsel. But this was done either solely in

his own interest, or partly in his own interest and partly in Greene's interest. In Mr. Justice Miller's dissenting opinion in Trustees vs. Greenough, 105 U. S., 527, 538, it is said: "This system of paying from a man's property those engaged in the effort to wrest it from him can never receive my approval; * * * " in Hobbs vs. McLean, 117 U. S., 567, 581-2, it is said:

(23) "As in our view the fund belongs to the plaintiffs in this suit, all that comes out of it for the compensation of the defendant comes out of their pockets. We see no reason why they should pay the defendant, who, instead of aiding them in securing their rights, has been an obstacle and obstruction to their enforcement. The services for which the defendant seeks pay from the plaintiffs were not rendered in their behalf, but in hostility to their interest. * * * But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate."

In Riddle vs. Hudgins, 58 Fed. 490, 494, it is said: "We know of no case where a Court can take the money of a plaintiff which happens to come into its possession, and use it to pay his adversaries attorneys." See also Hauenstein vs. Lynham, 100 U. S., 483; Nat'l Bank vs. Whitney, 103 U. S., 99, 104; Pike vs. Cincinnati Co., 179 Fed. 97, 103; Ryckman vs. Parking, 5 Paige Ch., 543, 3 N. Y., Ch. Rpts., 822, 824.

B. Is Kellogg entitled to an allowance as against Leary's estate?

In the original bill Kellogg was charged with a heavy liability to the government, and one the prayers (Supreme Court record No. 527, p. 34) was: "And that your orators may have a personal judgment against the said L. Laflin Kellogg for the amount of all of said trust funds traced to him which he may fail to account for." Kellogg was also, un[illegible] a much later stage of this litigation, under the mistaken belief that he had himself

personally agreed to indemnify Leary, and he maintained that the stock in his hands was in part security for the claims of his firm against Greene. (Record No. 527, p. 52.) In demurring to the original bill, in answering it, and in agreeing on the evidence to be used, he was acting in his own interest, with perhaps some thought for the interests of his client Greene. Benefit to Leary was not only incidental, but in some sense accidental. (24) Prior to the intervention of Leary's representative, Kellogg's expenditures and exertions were so directly in behalf of himself, were so necessary, as he understood his own position, to his own personal protection, that it seems to me improper to charge the Leary estate anything by way of allowance to Kellogg, at least prior to the intervention. In no sense did Kellogg oppose the government as a trustee for Leary, and, as Kellogg understood the facts as to the indemnity agreement, no opposition to the government's suit was necessary *in Leary's interest*. In his answer Kellogg averred (record, p. 52) that he was "personally amply responsible financially to meet and pay any judgment that may be recovered by the United States against him for the value of said 400 shares of Norfolk & Western stock * * *" If Leary was indemnified only by Kellogg, and if Kellogg was financially personally responsible to the extent of the value of the stock, Leary would not have suffered if Kellogg had been required to surrender the Norfolk & Western stock to the government. The loss would have been Kellogg's and not Leary's. I think, therefore, that everything done by Kellogg prior to the intervention was in intent and purpose done in his own interest and in Greene's interest.

After the bill of intervention was filed Kellogg's attitude was for some time, at least, not that of a zealous trustee acting in the interest of his *cestui que* trust. He did not appear to the original bill of intervention, and was not a party to the first appeal. He left Mrs. Leary to do the best she could for herself, without aid or advice from him. He did not enter a general appearance to the amended bill of intervention; on the other hand, his only appearance was special (see motion filed May, 1913,) and was for the purpose of moving to strike from the amended bill of intervention so much thereof as adopted his own version of the indemnity agreement, and sought, alternatively, to make him personally liable.

After this motion was granted (record No. 527, p. 79), Kellogg, who never answered either bill of intervention, (25) filed an amended answer to the original bill of the United States. In this answer, still insisting that the Norfolk & Western stock was in part pledged to secure the fees and disbursements of his own firm, Kellogg wholly omitted to make any averment, so highly important in the interest of Leary's estate, to the effect that by agreement the Norfolk & Western stock was impressed with the trust in favor of Leary. This led to objection by Mrs. Leary's counsel to the amended answer being read as against her, and it was so ordered (record 527, p. 101). A careful reading of this amended answer (record, 97-8) does not impress one that it was drafted with intent to benefit Leary's estate. The attitude of Mrs. Leary's counsel is itself sufficient to show how they regarded the document, and it seems to me that if the case for Leary's estate had not been subsequently made by the exertions of Mrs. Leary's own counsel, much stronger than it was when this amended answer was filed, the government would almost certainly have been entirely successful in this litigation.

An incident, occurring Nov. 29, 1913, (record No. 527 p. 106) goes to show the attitude of Kellogg towards Leary's representative. On Nov. 6th, (r. 100) the cause was re-opened on order that Mrs. Leary might introduce Kellogg as a witness in her behalf. When the hearing came on, counsel for Mrs. Leary declined to introduce Kellogg, stating (record, 106): "In a hasty interview of a few moments with Mr. Kellogg we find that we are given to understand that his testimony, if he is introduced as a witness in this cause, will be on a point that is exceedingly material to Mrs. Leary, on the teeth of his sworn answer, and under the circumstances we do not feel justified in introducing a witness, otherwise incompetent, and allowing him opportunity to undertake to disprove his answer". What occurred at the interview mentioned I do not know; but it seems at least rather clear that Kellogg's attitude towards Leary's representative was not friendly or helpful. It should be here said, how- (26) ever, that no criticism of Kellogg is intended. In the light of his then understanding of the facts he may have been fully justified in his position. But the fact remains that at the time in question neither he nor his counsel was aiding Mrs. Leary.

After the final decree of the trial Court of December 13th, 1913 (record 129), Mrs. Leary, by her own counsel, promptly appealed. Slightly more than a month later Kellogg also appealed. A reading of the brief for Kellogg in the Circuit Court of Appeals (cases 1277 & 8) indicates that Kellogg's own interest and Greene's interest were primarily and mainly in view and that benefit to Leary's estate was rather incidental. But in any event, and this applies also to the brief for Kellogg in the Supreme Court, arguments by Kellogg in aid of Leary's estate were supererogatory and wholly unnecessary. Mrs. Leary had since April, 1908, been represented by several very able counsel, who stood in no need of assistance from Kellogg. Assistance from him was gratuitous and uncalled for. An allowance to a trustee for unnecessary and uninvited assistance to an adequately represented beneficiary would hardly seem warranted. In 2 Perry on Trusts (4th ed.) Section 899, it is said: * * * and if trustees appear in a suit when it is unnecessary, they will not be allowed their costs." In 39 Cyc., 484, it is said: "A trustee can receive pay out of the trust fund for only such services and expenditures as are within the line of duties imposed upon him by the instrument creating the trust * * * The mere fact that he is a trustee will not support a demand on his part for compensation * * *. See also 28 Eng. & Am. Ency. (2d ed.), 1091; Stull vs. Harvey, 112 Va., 816.

The most difficult question in relation to making an allowance to Kellogg out of the part of the fund going to Leary's estate, arises from the fact that it was Kellogg's opposition to the government's demand which had the effect of preserving the fund until Leary's representative learned of the suit and intervened. However, as has been said, Kellogg's opposition to the government was not inspired by an intent to benefit Leary. (27) Kellogg's personal interest, and Greene's interest, so fully supplied the motive for Kellogg's actions that I can but think that it would unduly stretch the rule as to compensation to trustees to make to Mr. Kellogg any allowance out of the fund going to Leary's estate.

CLERK'S PERCENTAGE.

(28) Under Section 828, Rev. Stats., a clerk's fee of 1 per cent of the entire fund must be deducted. While this no longer goes to the clerk, still it is his duty to collect it for the government. On Dec. 1st, 1917, I entered a consent order that the clerk draw out of the fund $30,000 and pay it to counsel for Leary's representatives. On Dec. 10th, 1917, I signed an order directing the clerk to withdraw $300, being the 1 per cent on the part of the fund paid to Leary's representatives. When a final decree for distribution can be made this sum of $300, as well as 1% on the balance of the fund going to Leary's estate, must be deducted. Also a similar deduction should be made from the part of the fund going to the government.

HENRY C. McDOWELL,
District Judge.

December 20, 1917.

Endorsed: Filed Dec. 20, 1917.

LOUIS H. PRICE, Clerk.

STATEMENT AND DATE OF PAYMENT OF BOSD.

(29) Filed Dec. 31, 1917.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

The United States Against Benjamin D. Greene, et al., Defendants, and Daniel J. Leary and George Leary, Administrators of James D. Leary, Deceased, Intervenors.	In Equity.

Pursuant to the decree of this Court of December 20th, 1917, in the above entitled cause, we, Daniel J. Leary and George Leary, Administrators of James D. Leary, de-

ceased, making the following detailed statement of payments on the bail bond herein, showing the dates, amounts and nature of the expenses of the administrators in connection with the suit brought by the United States upon said bail bond.

PAYMENT BY ADMINISTRATRIX.

1910.		
July 26th—	Paid United States $40,802.00 in settlement of judgment entered upon said bail bond on January 6th, 1908, as per stipulation of Hon. Marion Erwin, Special Assistant to the Attorney-General of the United States ..... Hereto attached.	$40,802.00
1914.		
Jan. 3rd—	Paid David McClure and McClure & McClure, attorneys, as per bill, copy attached	591.46

for which amounts, with interest thereon from the respective dates of payment, the administrators make claim.

Dated, New York, December 28th, 1917.

DANIEL J. LEARY and GEORGE LEARY, Administrators d. b. n. of James D. Leary, deceased,
by GEORGE LEARY, Administrator.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN RISTRICT OF VIRGINIA.

(30)

The United States Against Benjamin D. Greene, et al., Defendants, and	In Equity.
Daniel J. Leary and George Leary, Administrators of James D. Leary, Deceased, Intervenors.	Bill, Etc.

IT IS STIPULATED on behalf of the United States, for use in the above-stated cause, that the records of the United States District Attorney's Office for the Southern District of New York show as follows:

That in the Circuit Court of the United States for the Southern District of New York on July 31st, 1903, the United States instituted a suit to recover the amount of $40,000.00 on a forfeited criminal recognizance against Mary C. Leary, as Administratrix of the estate of James D. Leary, deceased.

That on August 17th, 1903, the appearance of Kellogg & Rose, as attorneys for Mary C. Leary, as Administratrix, was entered in said suit, and that the same was conducted to final judgment in favor of the United States.

That the docket entries show said judgment as follows:

"Jan. 6, 1908—Judgment entered, against Mary C. Leary as Administratrix, etc., of the estate of James D. Leary for $35,347.15 Principal, $30.31 Costs. Total, $35,377.46."

The record also shows that the above judgment was paid on July 26, 1910, as follows:

"July 26, 1910—Received check of Mary C. Leary, dated July 25, 1910, on The Farmers' Loan & Trust Co., for $40,802, in payment of judgment entered Jany. 6, 1908. Amount made up as follows:

Judgment	$35,377.46
Interest to July 26, 1910	5,424.54
Total	$40,802.00"

(31) That the said amount is duly covered into the Treasury of the United States, and it is so stipulated this December 26th, 1917.

MARION ERWIN,
Special Assistant to the Attorney-General
of the United States.

(32) No. 22 William St., New York,

December 31, 1910.

ESTATE OF JAMES D. LEARY
TO
DAVID McCLURE and McCLURE & McCLURE, DR.

To Professional Services as Follows:

United States of America Against Mrs. Mary C. Leary, as Administratrix.

1908—March 2 to date.

Correspondence with Mr. D. J. Leary as to affecting service upon Mrs. Mary C. Leary, examination of notice of motion for leave to issue execution; interviews with Assistant U. S. District Attorney Dennison as to motion papers made in Surrogate's Court, correspondence with Mr. D. J. Leary as to result of interview; examination of law as to motion for leave to issue execution; attendance before Judge Hough and obtaining order to show cause in motion to stay collection of judgment; attendance at Judge Hough's chambers and argument of motion for stay denied. Attendance at Court on motion for leave to issue execution; consultation with Assistant U. S. District Attorney Dennison as to security; examination of authorities and preparation of brief; consultation at Mr. Leary's house with reference to motion for leave to issue execution; obtaining cost bond; preparation and service of answer to petition for execution; examination of affidavit and memorandum in reply; examination of order to terminate account; attending to verification and filing of account; interviews with Mr. Crane of O'Brien, Boardman, etc., etc., to account; correspondence with U. S. Attorney as to hearing on objections and as to examination of accountant; correspondence with Mr. D. J. Leary as to order of reference to Mr. Jordan J. Rollins and as to appeal, etc.; examination of all cases cited by petitioner; consultation with Mr. Leary at his house as to objections, etc.

1908.

Dec. 10—Attendance at reference on objections to account.

11—Consultation with Mr. D. J. Leary at his house examining and comparing first and second accounts; objections and discussing their meaning and effect and arranging course to be pursued in the further progress of the
(33) reference.

14—Examination of papers for use on reference.

16—Attended reference. Reference closed.

18—Correspondence with Mr. D. J. Leary as to condition of reference.

30—Examination of authorities and exhibits; preparation of brief.

Jan. 10, 1910: Referee's report sustaining objections served; preparation of stipulation extending time of accountant to file exceptions to Referee's report; preparation of affidavit and notice of motion for an order to return Referee's report; attendance at Court and argument of motion; motion denied; preparation of and attending to filing of exceptions to report, also service of same; examination of Surrogate's memorandum and cases cited therein; correspondence with Mr. D. J. Leary as to appeal from order denying motion; preparation of undertaking on appeal; preparation and service of notice of appeal; attending to having undertaking approved; preparation of notice of approval and filing of undertaking and notice of justification of surety; attendance at Court and argument of motion for stay of proceedings denied; attendance at Court, on motion to confirm Referee's report and argument of same; preparation of memorandum for Surrogate and filing same with Surrogate; preparation of papers on appeal; attending to service and filing of same; preparation of brief on appeal; attendance at Appellate Division and submission of papers on appeal from order denying motion to return report reversed; examination of proposed order for execution; examination of decree awarding execution; interview with U. S. Marshal as to execution; examination of order requiring accountant to appear before Commissioner Shields for examination; arranging adjournments of examination; obtaining amount of judgment; arranging about paying of same; obtaining re-

ceipt; preparation of papers on motion to vacate decree confirming report of Referee; examination of authorities as to effect of reversal of decree confirming report of Referee; attendance at Court and argument of motion to vacate decree; motion granted and ordered prepared (34) entered and served $500.00

DISBURSEMENTS.

Copy testimony	$10.00	
Printing papers on appeal	45.75	
Printing brief on appeal	9.00	
Subpoena fee, car fare, certified copy of order, opinion, typewriting, etc.....	26.71	91.46
Received payment		$591.46

Endorsed: Original statement and date of payment of bond. Copy received December 29, 1917.

MARION ERWIN.

Filed December 31, 1917.

LOUIS H. PRICE, Clerk.

STIPULATION.

(35) Filed January 23, 1918.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

The United States of America,
vs.
Benjamin D. Greene, et al., Defendants,
and
Daniel J. Leary and George Leary, Administrators of James D. Leary, Deceased, Intervenors.
} Bill, Etc.

STIPULATION.

WHEREAS, by a decree of the Court entered in the above stated cause on December 20th, 1917, it was provided, among other things:

(a) That the intervenors were entitled to be paid out of the fund in Court "the sum of $40,802, with interest on said sum from the date of which the personal representative of said James D. Leary paid said sum until payment," less certain deduction therein mentioned. And that intervenors were entitled to be paid:

(b) "Also the necessary and reasonable expenses, including reasonable counsel fees, laid out by the said Leary's representative in defending the action brought by the United States against said James D. Leary on the bail bond given by Benjamin D. Greene and James D. Leary and mentioned in the present proceedings."

It is now stipulated between the United States and intervenors, evidenced by the signature of their respective solicitors of record, as follows:

(1) That the date when the said sum of $40,802 was paid by Mary C. Leary, Administratrix, to the United States was July 26th, 1910.

(2) That the attorneys' fees and disbursements claimed by intervenors under the terms of clause "b" of the above mentioned decree is the sum of $591.46, paid on January 3rd, 1914, paid to David McClure and his firm, as will more fully appear by the notice of claim served on December 29th, 1917, by the Administrators of James D. Leary on Marion Erwin, Solicitor for the United States, pursuant to the directions of the decree of De-
(36) cember 20th, 1917, which notice, with the exhibits thereto, is hereto annexed as Exhibit "A."

It is further stipulated that the facts in regard to the proceedings in and about which said David McClure and his firm were paid the said sum of $591.46 are to be taken as stated in the stipulation between Marion Erwin, Solicitor for the United States, and Pierre M. Brown, local counsel in New York, for the Intervenors, and A. E. Strode, counsel of record for intervenors, dated January 1st, 1918, which is hereto annexed as Exhibit "B."

(3) It is the intent of this stipulation to do away with the necessity of either party taking depositions as provided in the decree of December 20th, 1917, and to submit the facts as hereinbefore stipulated, so as to leave it a pure question of law for the Court to decide as to whether, under those facts, the disbursement by the administrator of James D. Leary of said sum of $591.46 comes within the intent and purview of the clause of the decree of December 20th, 1917, which is designated "b" in this stipulation.

It being the contention of intervenors as to said $591.46 paid for fees and disbursements, they are entitled to be reimbursed, with interest, as indemnity out of the general fund. While it is the contention of the government that the facts shown they were fees and disbursements incurred after the final judgment in the Circuit Court in New York, which finally "established Leary's liability" on the bail bond, and were rendered solely in and about proceedings in the Surrogate's Court in resisting the efforts of the United States to collect the judgment, which proving futile, the then administratrix paid voluntarily without the execution being actually enforced, and that the same is not so chargeable.

(4) It is the intent of this stipulation that the adjudication of the above question shall be submitted to the Court, and that when notice of its decision is given, the counsel will prepare for a submission to the Court a final decree of distribution, which will cover all matters involved in the litigation which should be provided for.

This January 5, 1918.

MARION ERWIN,
Special Asst. to Atty.-General.

J. T. COLEMAN, JR.,
AUBREY E. STRODE,
Solicitors for Intervenors.

EXHIBIT A.

(38) In the United States District Court for the Western District of Virginia.

The United States Against Benjamin D. Greene, et al., Defendants, and Daniel J. Leary and George Leary, Administrators of James D. Leary, Deceased, Intervenors.	In Equity. Bill, Etc.

Pursuant to the decree of this Court of December 20th, 1917, in the above entitled cause, we, Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, making the following detailed statement of payments on the bail bond herein, showing the dates, amounts and nature of the expense of the administrators in connection with the suit brought by the United States upon said bail bond.

Payment by Adminixtratrix:

1910.		
July 26th	Paid United States $40,802.00 in settlement of judgment entered upon said bail bond on January 6th, 1908, as per stipulation of Hon. Marion Erwin, Special Assistant to the Attorney-General of the United States	$40,802.00
1914.		
Jan. 3rd	Paid David McClure and McClure & McClure, attorneys, as per bill, copy attached	591.46

for which amounts, with interest thereon from the re-

spective dates of payment, the administrators make claim.

Dated, New York, December 28th, 1917.

DANIEL J. LEARY and GEORGE LEARY, Administrators d. b. n. of James D. Leary, deceased, by

GEORGE LEARY,
Administrator.

(38) IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

The United States Against Benjamin D. Greene, et al., Defendants, and Daniel J. Leary and George Leary, Administrators of James D. Leary, Deceased, Intervenors.	In Equity. Bill, etc.

It is stipulated on behalf of the United States, for use in the above-stated cause, that the records of the United States District Attorney's Office for the Southern District of New York show as follows:

That in the Circuit Court of the United States, for the Southern District of New York on July 31st, 1903, the United States instituted a suit to recover the amount of $40,000.00 on a forfeited criminal recognizance against Mary C. Leary, as Administratrix of the estate of James D. Leary, deceased.

That on August 17th, 1903, the appearance of Kellogg & Rose, as attorneys for Mary C. Leary, as Administratrix, was entered in said suit, and that the same was conducted to final judgment in favor of the United States.

That the docket entries show said judgment as follows:

"Jan. 6, 1908, Judgment entered against Mary C. Leary as Administratrix, etc., of the Estate of James D. Leary for $35,347.15 Principal, $30.31 Costs, Total $35,377.46."

The record also shows that the above judgment was paid on July 26, 1910, as follows:

"July 26, 1910. Received check of Mary C. Leary, dated July 25, 1910, on The Farmers Loan & Trust Co., for $40,802, in payment of judgment entered Jany. 6, 1908.

(39) Amount made up as follows:

Judgment	$35,377.46
Interest to July 26, 1910	5,424.54
Total	$40,802.00"

That the said amount is duly covered into the Treasury of the United States, and it is so stipulated this December 26th, 1917.

MARION ERWIN,
Special Assistant to the Attorney
General of the United States.

No. 22 William St., New York,

December 31, 1910.

Estate of James D. Leafy
To
David McClure and
McClure & McClure Dr.

To Professional Services as Follows:

UNITED STATES OF AMERICA AGAINST MRS. MARY C. LEARY AS ADMINISTRATRIX.

1908.

March 2 to date — Correspondence with Mr. D. J. Leary as to affecting service upon Mrs. Mary C. Leary, examination of notice of motion for leave to issue execution; interviews with Assistant U. S. District Attorney Dennison as to motion papers made in Surrogate's Court, correspondence with Mr. D. J. Leary as to result of interview; examination of law as to motion for leave to issue execution; attendance before Judge Hough and obtaining order to show cause in motion to stay collection of judgment; attendance at Judge Hough's chambers and argument of motion for stay denied. Attendance at court on motion for leave to issue execution; consultation with assistant U. S. District Attorney Dennison as to security; examination of authorities and preparation of brief; consultation at Mr. Leary's house with reference to motion for leave to issue execution; obtaining cost bond; preparation and service of answer to petition for execution; examination of affidavit and memorandum in reply; examination of order (40) to terminate account; attending to verification and filing of account, interviews with Mr. Crane of O'Brien, Boardman, etc., etc., to account; correspondence with U. S. Atterney as to hearing on objections and as to examination of accountant. Correspondence with Mr. D. J. Leary as to order of reference to Mr. Jordan J. Rollins and as to appeal, etc. Examination of all cases cited by petitioner, consultation with Mr. Leary at his house as to objections, etc.

1908

Dec. 10 — Attendance at reference on objections to account.

11 — Consultation with Mr. D. J. Leary at his house

14 — examining and comparing first and second accounts; objections and discussing their meaning and effect and arranging course to be pursued in the further progress of the reference.

16 — Attended reference. Reference closed.

18 — Correspondence with Mr. D. J. Leary as to condition of reference.

30 — Examination of authorities and exhibits; preparation of brief.

1910
Jan. 10

Referee's report sustaining objections served; preparation of stipulation extending time of accountant to file exceptions to Referee's report; preparation of affidavit and notice of motion for an order to return referee's report; attendance at court and argument of motion, motion denied. Preparation of and attending to filing of exceptions to report also service of same; examination of Surrogate's memorandum and cases cited therein; correspondence with Mr. D. J. Leary as to appeal from order denying motion; preparation of undertaking on appeal; preparation and service of notice of appeal; attending to having undertaking approved; preparation of notice of approval and filing of undertaking and notice of justification of surety; attendance at court and argument of motion for stay of proceedings denied. Attendance at court on motion to confirm Referee's report and argument of same; preparation of memoran-
(41) dum for Surrogate and filing same with Surrogate; preparation of papers on appeal; attending to service and filing of same; preparation of brief on appeal; attendance at Appellate Division and submission of papers on appeal for order denying motion to return report reversed. Examination of proposed order for execution; examination of decree awarding execution; interview with U. S. Marshal as to execution; examination of order requiring accountant to appear before Commissioner Shields for examination; arranging adjournments of examination; obtaining amount of judgment, arranging about payment of same; obtaining receipt; preparation of papers on motion to vacate decree confirming report of Referee; examination of authorities as to effect of reversal of decree confirming report of Referee; attendance at court and argument of motion to vacate decree, motion grantd and order prepared, entered and served.
$500.00

DISBURSEMENTS.

Copy testimony	$10.	
Printing papers on appeal	45.75	
Printing brief on appeal	9.00	
Subpoena fee, carfare, certified copy of order opinion, typewriting, etc.	26.71	91.46
Received payment		$591.46

EXHIBIT "B."

(42) IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

The United States vs. Benjamin D. Greene, et al., Defendants, and Daniel J. Leary and George Leary, Administrators of James D. Leary, Deceased, Intervenors.	In Equity Bill, Etc.

It is stipulated between the Solicitor of the United States and New York counsel for Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, Intervenors, as follows:

That subsequent to the rendition of the judgment of April 6, 1908, in the Circuit Court of the United States for the Southern District of New York against Mary C. Leary, Administratrix of James D. Leary, deceased (on the suit therein on the bail bond given by James D. Leary as surety for Benjamin D. Greene) for the sum of $35,377.46, the following proceedings were had, in which David McClure and his associate Mr. Haldane appeared as attorneys for Mary C. Leary, administratrix, to wit:

On April 8, 1908, there was filed in the Surrogates' Court for the County of New York a petition of the United States setting forth, among other things, that on January 6th, 1908, the United States recovered a final judgment in the Circuit Court of the United States for the Southern District of New York against Mary C. Leary, Administratrix of James D. Leary, deceased, in the sum of $35,347.15 together with the sum of $30.31 costs and disbursements, making a total of $35,377.46;

That no execution has been issued upon said final judgment;

That Mary C. Leary now has in her hands and under her control assets belonging to the estate of said James

D. Leary, deceased, which are applicable to said final judgment.

That with said petition was a notice of motion for an (43) order of the Surrogate for an order granting leave to have issued an execution upon said final judgment to be enforced against the estate of James D. Leary in the hands of the Administratrix.

That a copy of petition and motion were duly served upon said Administratrix, and she duly appeared thereto in said Surrogates' Court by David McClure, her attorney.

On April 8, 1908, Mary C. Leary, Administratrix, by David McClure filed a petition in United States Circuit Court for Southern District of New York before Judge Hough to restrain the United States from proceeding with its motion in the Surrogates' Court, which petition was denied by Judge Hough on April 9, 1908.

Thereafter various proceedings were had in the Surrogates' Court, including a reference and accounting from Mary C. Leary, Administratrix, and which finally resulted in a judgment of the Surrogates' Court on May 20, 1910, as follows:

"Further ordered that the petitioner, the United States of America, be and it hereby is permitted and allowed to issue execution against said Administratrix in the sum of Thirty-five thousand three hundred and seventy-seven and 46 100 Dollars $35,377.46, with interest thereon from Jan. 6, 1908; and it is,

Further ordered, that the said Mary C. Leary, individually pay the costs in this proceeding which are hereby fixed as taxed in the sum of Three Hundred forty Dollars ($340.00), and that petitioner have executed therefor.

JOHN P. COHALAN,
Surrogate."

That thereafter, to wit, on July 26, 1910, the said Mary C. Leary, Administratrix, paid over to the United States the amount due on said judgment of the United States Circuit Court for the Southern District of New York on Jan. 6, 1908, as follows:

Judgment	$35,377.46
Interest to July 26, 1910	5,434.54
	$40,802.00

That the services and disbursements for which David McClure rendered a bill to Mary C. Leary, Administratrix, on Jan. 3, 1914, for $500.00 for services and $91.46 for disbursements as stated in the statement served upon Marion Erwin, Solicitor for the United States, on Dec. 29, 1917, were rendered by the said McClure in and about said proceedings in said Surrogates' Court.

(44) That the Government, while not admitting that said services and disbursements were rendered and incurred in the suit on the bail bond or in establishing James D. Leary's obligation on the bail bond, admits that the services were rendered by said David McClure for said Mary C. Leary, Administratrix, in and about said proceedings in said Surrogates' Court and was a reasonable attorney's fee for such service, and that said sum of $91.46 was actually disbursed by said David McClure in and about said proceedings in said Surrogates' Court, and that Mary C. Leary, Administratrix, paid said $591.46 to said David McClure on Jan. 3, 1914.

The defence of Mary C. Leary in the suit in the United States Circuit Court for the Southern District of New York up to and including the final judgment of Jan. 6, 1908, was conducted by Kellogg & Rose, as attorneys at the instance and expense of Benjamin D. Greene, and not at Leary's expense.

This stipulation is made for the purpose of avoiding the necessity of taking depositions to prove the facts herein set out, and is to be considered as going into effect only after it is signed by Mr. A. E. Strode, of Lynchburg, Va., of Counsel for intervenors.

Dated, this 1 day of January, 1918.

MARION ERWIN,
Special Asst. to the Atty. Genl.
Solicitor for the United States.

PIERRE M. BROWN,
Attorney in New York for Administrators.

J. T. COLEMAN, JR.,
AUBREY E. STRODE,
of Counsel for Intervenors.

Endorsed Stipulation. Filed January 23, 1918.

LOUIS H. PRICE,
Clerk.

DECREE OF DISTRIBUTION.

(45) Entered March 15, 1918.

At a Regular Term of the District Court of the United States for the Western District of Virginia, begun and held at Lynchburg in and for said District on March 12th, 1918.

Present: Hon. Henry C. McDowell, Judge.

The United States of America, Complainant,
against
Benjamin D. Greene, Luther Laflin Kellogg and the Norfolk & Western Railway Company, Defendants,
and
Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, substituted as such administrators in place of Mary C. Leary, administratrix, deceased, Intervenors.

FINAL DECREE OF DISTRIBUTION.

Whereas, the above stated cause came on to be heard on the 30th day of November, 1917, in pursuance of the order of this Court of November 19th, 1917, making the mandate of the Supreme Court of the United States the judgment and decree of this Court, and the assignment of said cause for hearing for final decree or decrees in the cause upon the pleadings, proofs and mandate and upon the motion of the defendant, Luther Laflin Kellogg, for allowance of compensation, disbursements and costs out of the fund in Court, and objections of the United States and Intervenors thereto, and upon the petition of the Intervenors for allowance of compensation, counsel fees, disbursements and costs, and the objections of the United States thereto;

The United States appeared by Marion Erwin, Special Assistant to the Attorney General, the intervenors appeared by Aubrey E. Stroke and J. T. Coleman, their solicitors, and the defendant Kellogg appeared by Abram J. Rose, his solicitor, and after arguments of counsel heard; the Court reserved its opinion; and

Whereas, thereafter on the 20th day of December, 1917, the Court filed its opinion and entered its judgment and decree, whereby it was decreed among other things, as (46) follows:

1. That the prayer of said L. Laflin Kellogg for allowance of compensation out of the fund in Court be finally denied and overruled;

2. That the prayers of the administrators of the estate of James D. Leary, deceased, intervenors, for allowance to them for the costs and expenses, attorneys fees and disbursements incurred and paid by them on the proceedings on said intervention, be finally denied and overruled;

3. That said administrators of James D. Leary, deceased, were entitled to have out of the fund in Court, in addition to their principal claim, the necessary reasonable expenses, including counsel fees, if any, which had been expended by the Leary administrators in defending the action brought by the United States against James D. Leary's estate on the bail bond mentioned in the intervention, and therein providing that the intervenors serve within fifteen (15) days a detailed statement of the amount so claimed upon the counsel, of record for the United States, and further providing for leave to said parties in interest to take depositions and counter-depositions in support or opposition to such claim, and the proofs to be thereafter submitted to the Court for determination; and

Whereas, the said intervenors did on December 29th, 1917, serve such detailed statement on said counsel for the United States, and thereafter, to obviate the necessity of taking depositions, the counsel for said intervenors and of the United States by stipulation submitted on an agreed state of facts to the Court and on briefs whether the items of counsel fees, costs and disbursements, aggregating some $591.46, claimed and mentioned in said statement, were such as were allowable to the intervenors out of the fund in Court under the true intent and meaning of the order and decree of the Court of December 20th, 1917, and the rights of the parties; and the Court did, on the 23rd day of January, 1918, give notice to counsel of its opinion that said items claimed were not

allowable to intervenors, and it being now so hereby decree; and

Whereas, it was determined by the decree of this Court (47) of December 20th, 1917, that the administrators of the estate of James D. Leary, deceased, were entitled to have from the fund in the custody of the Court in this cause, subject to deduction of the sum of $30,000.00 paid them under the order of this Court of December 1, 1917, and subject to the further deduction under Sec. 838 U. S. R. S., of 1% of the entire amount paid and to be paid them, the sum of $40,802.00 with interest on said sum at the rate of 6 per cent. per annum from the date on which the personal representative of said James D. Leary paid said sum until payment; and

Whereas, by stipulation between the parties it appears that said date of payment was the 26th day of July, 1910; and

Whereas, by agreement of the parties and the order of this Court entered December 1st, 1917, the four hundred (400) shares of Norfolk & Western Railway Company stock which at the beginning of the controversy in this cause stood on the books of the said Railway Company the name of Luther Laflin Kellogg was sold on or about December 19th, 1917, and the net proceeds aggregating the sum of $38,384.00 was paid over to the Clerk of this Court and deposited on the ..... day of December, 1917, in the Lynchburg National Bank, subject to the further orders and decrees of this Court,—the existing claims of all parties to this cause on the said stock without prejudice to be transferred to said proceeds; and

Whereas, after the filing of the bill in this cause and prior to the sale of said stock as heretofore stated, the income and profits arising from said stock and accumulations thereof with the dividends to December 19, 1917, inclusive, aggregating the sum of $30,966.37, were from time to time deposited by the Clerk of this Court with the Lynchburg National Bank, subject to the order of the Court, said deposits bearing interest at 3 per cent. per annum; and

Whereas, the aggregate of the several sums so deposited in the Lynchburg National Bank, with the interest thereon which has or which may accumulate thereon to the time of payment under final decree of distribution, constitutes the total fund for final distribution in this cause, less such amounts as have already been paid there-

(48) from under the orders of the Court;

Now, therefore, it is considered, adjudged, ordered and decreed by the Court, as follows:

(a) That the said Daniel J. Leary and George Leary, administrators of the estate of James D. Leary, deceased, have a first claim and lien superior to the claim of all other parties to the cause on the fund in Court to the amount of $40,802.00 principal, with $17,986.88 for interest thereon at 6 per cent. per annum from the 26th day of July, 1910, to the 1st day of December, 1917, when under order of the Court the sum of $30,000.00 was advanced and paid to said intervenors on their said claim, leaving then a balance due them of $28,788.88, and with such a superior lien on the fund in Court for the amount of the said balance of $28,788.88 with interest thereon at 6 per cent. per annum from December 1st, 1917, until the 10th day after the date of this decree, and the Clerk of the Court is hereby directed to draw a check on the Lynchburg National Bank on the said funds so on deposit, in favor of A. E. Strode and J. T. Coleman, Jr., counsel for said intervenors, for the said balance and interest thereon as aforesaid, less the sum of $300.00, being Clerk's poundage under Sec. 838 U. S. Revised Statutes, chargeable against said $30,000.00 advanced and less 1 per cent. additional for Clerk's poundage on the said balance of $28,788.88 and interest thereon above mentioned; and the Clerk of this Court is directed to deliver said check to said counsel for the benefit of said intervenors and as full payment of all claims of whatever kind of the estate of James D. Leary, deceased, on the fund in Court.

(b) It is further ordered, adjudged and decreed that after payment of the said amounts hereinbefore decreed to be paid to or for the benefit of the said representatives of the estate of James D. Leary, deceased, the balance of said fund in Court arising from the proceeds of the sale of said 400 shares of Norfolk & Western Railway Company stock, and from the accumulated dividends, income and profits of the same since the filing of complainant's bill, being the funds now on deposit in (49) said Lynchburg National Bank, with interest accumulated or which may accumulate thereon, less the said sum paid and directed to be paid to the said estate

of James D. Leary, deceased, as aforesaid, be and the same is declared to be the property of the United States, free from the claims of all other parties to this suit, and of their agents, attorneys and privies.

(c) That the surplus decreed to the United States in paragraph (b) hereof, after the deduction of the Clerk's poundage of 1 per cent. thereon and after the payment of such proper charges and allowances therefrom, if any, as may be allowed by the Attorney General and approved by the Court shall be by the Clerk, when directed by the Attorney General, deposited in a designated depository of the United States to the credit of the Treasurer of the United States as a collection in this cause, to wit, in the case of the United States vs. B. D. Green, et al.

(d) The Clerk of this Court is directed to deliver a certified copy of this decree to the Lynchburg National Bank and the same shall be authority to said Bank to honor such check as are drawn and issued by the Clerk in accordance with the directions of this decree.

(e) Otherwise than as may have been hereinbefore directed, each party shall pay his or its own costs.

But this decree is not to go into effect or be executed until ten days from the day of its date.

ASSIGNMENT OF ERRORS.

Filed March 22, 1918.

(50) In the District Court of the United States the Western District of Virginia.

The United States of America vs. Benjamin D. Greene and others, Defendants, and Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, Intervenors.	In Equity.

ASSIGNMENT OF ERRORS.

Now comes the above named Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, appellants, and files herewith their petition, and says that there are errors in the records and proceedings of the above entitled cause; and for the purpose of having the same reviewed in the United States Circuit Court of Appeals for the Fourth District, makes the following assignments of error, to-wit:

FIRST: The United States District Court for the Western District of Virginia, in its decree of December 20th, 1917, erred in holding and deciding that, for the entire amount decreed to the said Daniel J. Leary and George Leary, Administrators as aforesaid, should be deducted one per cent and in not holding that the entire sum of $40,802.00, with interest from the 26th day of July, 1910, until paid should be paid to the said Administrators without deducting therefrom the aforesaid one per cent.

SECOND: The said District Court in its decree of December 20th, 1917, erred in holding and deciding that the said Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, were not entitled to the costs and expenses incurred by the Leary estate in establishing the prior right and equity of the said Leary estate to the fund in litigation, arising from the sale of the four hundred shares of Norfolk & Western Railway Co. stock and from the accumulated dividends thereon and in not decreeing to the said Leary estate, in addition to the sum above set out, a sum sufficient to (51) cover the necessary expenses, counsel fees and costs necessary incurred by the said Leary estate in establishing the prior right in the Leary estate to the said funds in litigation prior to the rights of the United States of America and of other parties.

THIRD: The said District Court erred in its decree of March 12th, 1918, in holding and deciding that the said Administrators of James D. Leary, deceased, were not entitled to receive, as counsel fees, costs and disbursements, in defending the action brought by the United States against the said James D. Leary on the bail bond given by Benjamin D. Greene and James D. Leary, the

sum of money amounting to $591.46, claimed and proved by the said Administrators, and in failing to decree that the said sum be paid to the said Administrators out of the fund in the hands of the Court.

FOURTH: Said District Court erred in its decree of March 12th, 1918, in holding and deciding that the balance of the fund in court arising from the proceeds of the sale of four hundred shares of Norfolk & Western Railway Co. stock and from the accumulated dividends, income and profit thereon, after the payment to the Leary estate of the amount decreed to the said Leary estate, was the property of the United States free from the claims of all other parties to this suit and their agents, attorneys and privies, and in not holding and deciding and decreeing to the said Administrators the necessary amount expended in this litigation by the Leary estate in establishing their prior equity in the fund arising from the said sale of the Norfolk & Western Railway Co. stock and accumulated dividends, income and proceeds therefrom.

Wherefore, the said Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, appellants, pray that for the errors aforesaid and other errors appearing in the record of the said United States District Court for the Western District of Virginia, in the above entitled cause to the prejudice of the said appellants, petitioners, the said judgments and decrees of the said United States District Court for the Western District of Virginia, to-wit; the decree entered therein on the 20th day of December, 1917, and the decree entered therein on March 12th, 1918, in the said cause, be reversed, annulled and for naught esteemed, and that said cause be remanded to the said United States District Court for the Western District of Virginia, with instructions for such further proceeding in said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

(52) DANIEL J. LEARY and GEORGE LEARY, Administrators of JAMES D. LEARY, deceased, Appellants.
By A. E. STRODE and
J. T. COLEMAN, Jr.,
Their Solicitors.

Endorsed. Assignment of Errors Filed March 22, 1918.

STANLEY W. MARTIN,
Clerk.

By LOUIS H. PRICE,
Deputy.

OBJECTIONS OF UNITED STATES.

(53) Filed Nov. 30, 1917.

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF VIRGINIA.

United States, Complainant,
vs.
Benjamin D. Green, L. Laflin Kellogg, Defendants.

OBJECTIONS OF THE UNITED STATES.

To notice served November 21, 1917, by attorney for Luther Laflin Kellogg, of intention to ask the Court for allowance of compensation and reimbursement to him.

And now comes the United States, by Marion Erwin, Special Assistant to the Attorney General, and makes objection to the grant by the Court, of the relief sought by said Kellogg, as set forth in the above notice, and for specification of objections say:

(1) That the statement in the preamble to said notice that the Supreme Court sent the said matter "back to the District Court to determine the allowance to the defendant L. Laflin Kellogg as trustee" is a misinterpretation of said opinion and direction therein of the Supreme Court,—the direction being that the District Court determine "whether Kellogg should receive an allowance as trustee." The true intent thereof being that the District Court should determine whether upon the pleadings and proofs in the litigation and the law applicable, Kellogg, who was finally held to be trustee for Leary, could properly be held to have rendered services to the Leary estate as such trustee in the protec-

tion of the trust, which would entitle him to compensation out of the trust fund awarded to Leary.

(2) That said Kellogg as shown by the record, neither by his pleadings or by proofs, made any claim or defense in said cause as trustee for the benefit of the Leary estate, his defense being solely in behalf of Greene and for the establishment of his personal claims, and that the recovery for the Learys was achieved solely upon the intervention of the Leary administrators conducted sorely (54) by their counsel and sustained by proofs submitted by them, to which intervention said Kellogg did not appear, and whose attitude in the trial court in respect thereto was entirely passive.

(3) That if said Kellogg has rendered any service in the protection of the trust fund decreed to the Leary estate, his compensation and disbursements in respect thereto, if chargeable at all, are chargeable against the principal and interest recovered by the Leary estate, and not out of the surplus in excess thereof belonging to the United States, under the decree directed by the Supreme Court. Such compensation being taxable only as between attorney and client, and not as between party and party.

(4) That no solicitors' fees or costs, in behalf of either intervenor or Kellogg, for services or disbursements on the contest between the United States and Leary or Kellogg in respect to the Leary claim, can be properly taxed against the general fund in Court, or against the United States. That if the same is taxable at all, it would be only as between attorney and client, to charge the same upon the amount of principal and interest recovered by the Leary estate.

(5) That no costs are taxable against the United States in a case of this character.

(6) That the Appellant Courts awarded no costs against the United States on the several appeals in this cause, and their action is conclusive on this Court in that respect.

(7) As to the disbursements therein stated in the exhibit to said notice under the head of

"Items of disbursements made by L. Laflin Kellogg, Trustee, in defense of the right of indemnity to Leary estate out of stock in his hands in suit of United States vs. Greene and Kellogg."

That it does not appear upon the face of the exhibit or statement in the notice that any of said items are taxable costs as between party and party, nor that they are charges of such a nature as could be taxed in favor of said Kellogg against the general fund in Court, nor taxable against the United States, nor against the surplus fund in excess of the principal and interest awarded the Leary estate. That it affirmatively appears that most of said alleged disbursements were expenses incurred by Kellogg in his accounting for assets traced to him other (55) than the 400 shares of Norfolk & Western stock. For instance, there is an item of $225.00 alleged paid R. H. Fiero "for services" June 11, 1909, the latter being a broker, who was in the habit of carrying messages between Greene and Kellogg (printed Record, p. 119). Fiero was not a witness in the case, nor does the record disclose that he rendered any service for the benefit of the Leary estate.

(8) By reason of the premises the United States says that the decree to be entered on the mandate of the Supreme Court should provide that the surplus arising from the net proceeds of the sale of the 400 shares of Norfolk & Western stock and accumulated income thereof after the payment to the Leary estate of the $40,802, principal and interest thereon at 6% per annum to date of decree, belongs to the United States free from the claims of all other parties to the cause, and of their attorneys, solicitors or agents, and that when said $40,802 and interest to date of the decree shall be set aside from the whole fund in Court, the said surplus in excess thereof, after the payment of such proper charges and allowances therefrom as may be allowed by the Attorney-General and approved by the Court, shall be deposited in a designated depository of the United States to the credit of the Treasurer of the United States as a

collection on the claim of the United States against Benjamin D. Greene, in this cause.

MARION ERWIN,
Special Asst. to the Atty.-General,
Solicitor for the United States.

Filed November 30, 1917.

LOUIS H. PRICE, Clerk.

MEMORANDUM OF THE UNITED STATES IN REPLY TO INTERVENORS' COUNSELS' MEMORANDUM OF FEBRUARY 20TH, 1918.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA.

The United States of America
Against
Benjamin D. Greene, et al.

MEMORANDUM OF UNITED STATES IN REPLY TO INTERVENORS' COUNSELS' MEMORANDUM OF FEBRUARY 20TH, 1918.

The only point made by Intervenors' counsel in their memorandum of February 20th, 1918, a copy of which (56) was mailed to the undersigned, which has not heretofore been replied to, rests upon their statement of fact in the first paragraph therein, as follows:

"While, as the learned counsel for the government apparently recognized in the opening paragraph of his memorandum, the rights of the parties to the fund involved have been fixed by previous decrees, he apparently fails to apprise the character of the decree of distribution now proposed. The previous decrees were final decrees and will, of course, stand unless appealed from and reversed."

It is important to know just what previous decrees are here referred to by counsel for the Interveners as final. The Supreme Court of the United States, on motion of the other side to dismiss the government's appeal to it from the decree of the Court of Appeals, held

that the latter decree was "final." Yet the thing which made it final was simply the holding that the claim of the Leary, as made in the intervention, was superior to the claim of the United States on the fund. The Leary claim in the Intervention was for the specific amount of $40,800, and interest *from December 31*, 1910, the date it was alleged that amount was paid, and I always questioned the power of the District Court after mandate to receive evidence to fix an earlier date for interest from any other date than December 31, 1910, certainly not for any other reason than that stated in the opinion of the Court of December 20th, 1917, to correct what was claimed by Leary's counsel to be a clerical error in stating the date.

The Court on December 20th, 1917, entered its decree that interest should be paid the Learys out of the fund from the actual date on which the $40,800 had been paid to the government, and provided means for taking further evidence to ascertain that date. That part of the decree was nothing more than an interlocutory decree, not a final decree, since it left something more to be decided by the Court before the specific amount to be paid to the Learys could be definitely known.

The fact that the government and the Learys thereafter agreed upon certain evidence which definitely fixed the date of payment as of July 26th, 1910, did not change the fact that the decree of December 20th, 1917, which settled the principal on which the date from which interest was to run was fixed was interlocutory. It made it necessary that there should be this present proposed *final decree* of distribution.

(57) It has never been conceded by the undersigned that as a matter of law Interveners had a right to get interest on their claim from a time anterior to the time stated in their intervention after the entry of mandate from the Supreme Court. That it is fact that the date of payment was erroneously stated in their intervention as December 31, 1910, instead of July 26, 1910, is shown by the evidence taken since December 20, 1917. But their right to make proof of such fact and reopen that question after mandate is a totally different question. Undoubtedly, when the actual date of payment is admittedly now shown to be July 26, 1910, there is nothing else for the government to do but submit a final de-

cree conforming to the Court's interlocutory decree of December 20, 1917, as we have done. Even if it be admissible to open the pleadings of interveners for the purpose of correcting an error in pleading at that stage, we do not think that justified the opening of the questions of allowances, as part of the indemnity contract, not pleaded; and, although if that was error, it was eliminated by the finding against such allowance claims, we do not concede that the fact that this Court considered those questions and denied them, gives a right to litigate them again in the Supreme Court.

It is not true, therefore, that it is not in dispute on the record that the Learys are entitled to the exact amount of $40,800 and interest from July 26, 1910, which the decree we propose, to conform to the opinion of the Court, provides should be paid to the Learys.

It was not the intention of the government to raise that question if the decree to be entered in accordance with the prior rulings subsequent to the mandate were accepted all round so as to end the litigation, we were prepared to waive any rights of exception for the purpose of ending the litigation. But we will not waive those rights if the Learys are to be allowed to take the full sum decreed them from July 26, 1910, and then tie up the balance of the sum decreed to the government.

I admit that there are certain parts of the decree of December 20, 1917, which are final, such, for instance, as the decree that Kellogg had no claim whatever on the fund in Court, either as against the Learys or as against the government, but that does not touch the question (58) now at issue between the Learys and the government.

MARION ERWIN,
Special Assistant to the Attorney-General.

February 23, 1918.

PRAECIPE FOR RECORD OF APPELLANTS.

(59) Filed May 2nd, 1918.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Appeal to the Circuit Court of Appeals for the Fourth Circuit from decrees of the District Court for the Western District of Virginia, allowed March 22nd, 1918.

Daniel J. Leary and George Leary, Administrators of James D. Leary, Deceased, Appellants,
vs.
United States of America and L. Laflin Kellogg, Appellees.

Praecipe for Record.

To the Clerk of the District Court of the United States for the Western District of Virginia:

You will please embody in the record of the appeal, above described, to be certified by you to the Circuit Court of Appeals for the Fourth Circuit the following:

(1) The Mandate of the Supreme Court of the United States, filed in your office November 19, 1917.

(2) The Order entered November 19, 1917.

(3) The Petition and the Exhibits therewith of Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, filed November 30, 1917.

(4) Order of December 1, 1917.

(5) Order of December 10, 1917.

(6) Order of December 12, 1917.

(7) Order of December 20, 1917.

(8) Opinion of Honorable Henry C. McDowell, Judge of the District Court, referred to in order of December 20, 1917.

(9) Statement and Stipulation, dated December 26, 1917, filed December 31, 1917.

(10) Stipulation, dated January 1, 1918, filed January 23, 1918, referred to in order of March 12, 1918.

(60) (11) Order of March 12, 1918.

(12) Memorandum stating the date of the Petition for Appeal, March 22, 1918; the date of the Order allowing Appeal, March 22, 1918; the date when copy of Order allowing Appeal lodged in the office of the Clerk of the Court for the adverse Parties, March 22, 1918; the date of the Appeal Bond, March 21, 1918; the penalty thereof, $1,000; the name of the obligors, J. T. Coleman, Jr., and Globe Indemnity Company; the condition thereof, to answer all costs and damages; the date of the Citation, March 22, 1918; the date of the Acknowledgement of service thereof, March 23rd, 1918.

(13) Assignment of errors, filed by said Appellants on March 22, 1918.

Dated this 23rd day of April, 1918.

Respectfully,

A. E. STRODE,
J. T. COLEMAN, JR.,
Solicitors for Appellants.

Endorsed. Service of a copy of the within Praecipe is hereby acknowledged this 29 day of April, 1918.

ABRAM J. ROSE,
Attorney for L. Laflin Kellogg.

MARION ERWIN,
Special Asst. to Atty.-General.

Filed May 2nd, 1918.

STANLEY W. MARTIN, Clerk.
By LOUIS H. PRICE, Deputy.

PRAECIPE FOR RECORD OF APPELLEE.

(61) Filed May 6, 1918.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA.

Daniel J. Leary and George Leary, Administrators of James D. Leary, Deceased, Appellants,
Against
United States of America and L. Laflin Kellogg, Appellees.

PRAECIPE FOR RECORD.

To the Clerk of said Court:

In addition to the papers designated to be sent up on their appeal by the solicitors for the appellants in above cause in their Praecipe for transcript of record, dated April 23rd, 1918, the United States designates the following to be sent up:

1. The objections made by the United States and noted in and with the acknowledgment of service on the petition of the said Learys of November 30th, 1917, for allowance of expenses, counsel fees, etc.

2. Memorandum of solicitor for the United States, dated February 23rd, 1918, filed with Judge McDowell.

Respectfully,

MARION ERWIN,
Special Assistant to the Attorney-General,
Solicitor for the United States.

May 4th, 1918.

Legal service accepted May 6th, 1918.

A. E. STRODE,
J. T. COLEMAN, JR.,
for Danl. J. and George Leary, Admrs.

Filed May 6, 1918.

STANLEY W. MARTIN, Clerk.

STIPULATION TO PREPARE TRANSCRIPT OF RECORD AND PRINT SAME UNDER RULE 23 OF UNITED STATES CIRCUIT COURT OF APPEALS.

In the District Court of the United States for the
(62) Western District of Virginia.

Daniel J. Leary and George Leary,
Administrators of James D.
Leary, Deceased, Appellants,
vs.
United States of America and L.
Laflin Kellogg, Appellees.

It is hereby stipulated and agreed that the Clerk of this Court shall make up a transcript of the record in the above styled cause, which shall contain the papers and proceedings designated in the praecipe for transcript filed by counsel for appellants and for the United States, and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va.; and that it be printed under the supervision of the Clerk of that Court, in accordance with Rule 23.

A. E. STRODE,
J. T. COLEMAN, JR.,
Counsel for Appellants.

MARION ERWIN,
Special Asst. to the Atty.-General,
Counsel for the United States.

May 16, 1918.

NOTE—Original stipulation must be filed in the District Court and copied into the transcript of the record.

ORDER ENTERED APRIL 20, 1918, EXTENDING TIME FOR FILING RECORD.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
(63) DISTRICT OF VIRGINIA.

Continued and Held at Lynchburg, on
April 20th, 1918.

United States
vs.
Benjamin D. Grene, et al.

On motion of Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased.

It IS HEREBY ORDERED that the time for filing the transcript of record on appeal in this cause in the office of the Clerk of the Circuit Court of Appeals for the Fourth Circuit be, and it is hereby extended for thirty days from this date.

MEMORANDUM OF CLERK.

(64) 1. Petition for Appeal filed March 22, 1918.

2. Order Allowing Appeal Entered March 22, 1918.

3. Copy Order allowing Appeal lodged in Office of the Clerk for Adverse Parties, March 22, 1918.

4. Appeal Bond, dated March 21, 1918.
Penalty, $1,000.00.
Obligors: J. T. Coleman, Jr., and Globe Indemnity Co.
Conditioned to answer all costs and damages.

5. Citation. Dated March 22, 1918, the date of the

STANLEY W. MARTIN,
Clerk.

ORDER TO TRANSMIT RECORD.

And thereupon it is ordered by the Court here that a transcript of the record and proceedings in the case aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

STANLEY W. MARTIN,
Clerk.

CLERK'S CERTIFICATE.

United States of America,
Western District of Virginia—ss:

I, Stanley W. Martin, Clerk of the District Court of the United States for the Western District of Virginia, at Lynchburg, in and for said district, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings in the matter of Daniel J. (65) Leary and George Leary, Administrators of James D. Leary, deceased, Appellants, versus United States of America and L. Laflin Kellogg, Appellees, as appear from the records of my said office, at Lynchburg, Virginia.

Given under my hand and the seal of said Court at Lynchburg, Virginia, this 18th day of May, 1918.

(Seal) STANLEY W. MARTIN,
Clerk United States District Court for the Western District of Virginia.

On the same day, to-wit, May 20, 1918, the original petition for appeal, order allowing appeal, appeal bond and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of J. T. Coleman, Jr., and Aubrey E. Strode is entered for the Appellants.

May 22, 1918, the appearance of Marion Erwin, Special Assistant to the Attorney-General, is entered for the Appellee.

June 7, 1918, twenty-five copies of the printed record are filed.

ARGUMENT OF CAUSE.

July 18, 1918 (July Term, 1918), cause came on to be heard before Knapp and Woods, Circuit Judges, and Connor, District Judge, and is argued by counsel and submitted.

OPINION.

(66) Filed January 16, 1919.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 1640.

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS OF JAMES D. LEARY, DECEASED, Appellants,

versus

THE UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg.

(Argued July 18, 1918. Decided Jan. 16, 1919.)

Before KNAPP AND WOODS, Circuit Judges, and CONNOR, District Judge.

AUBREY E. STRODE AND J. T. COLEMAN, JR., for appellants, and MARION ERWIN, Special Assistant to the Attorney General, for appellee.

Knapp, Circuit Judge:

The previous course of this litigation appears in the opinions of this court and the Supreme Court on former appeals. *Leary* v. *United States*, 184 Fed. 433; *Leary* v. *United States*, 224 U. S. 567; *Leary* v. *United States*, 229 Fed. 660; *United States* v. *Leary*, 245 U. S. 1. A brief statement will disclose the questions now to be decided.

When Greene was arrested in 1899, charged with defrauding the Government, he placed in the hands of Kellogg his attorney certain securities, represented by the fund afterwards paid into court, to indemnify Leary, appellants' intestate, for going on his bond. The last bond signed by Leary was forfeited, Greene having absconded, and in a suit thereon the United States recovered a judgment against his estate which was paid on July 26, 1910, amounting then with interest and costs to $40,802.00.

Meanwhile, in 1903, the United States had sued Kellogg and others for an accounting, and to have the 400 shares of Norfolk & Western stock, standing in his name on the books of that company, declared to be its property, on the ground that the same, or securities exchanged for it, had been purchased by or for Greene with moneys of the United States which he had misappropriated. The Leary estate was not made a party to this suit, but in 1908, when the testimony had been taken and the case was ready for hearing, it filed a bill of intervention, setting up the agreement of Greene through his attorney to indemnify Leary, alleging that the Norfolk & Western stock constituted the indemnity fund, and praying that it be applied accordingly. Without reciting the subsequent proceedings it suffices to say that the decision of this court on the second appeal, 229 Fed. 660, affirmed by the Supreme Court, 245 U. S. 1, determined with finality that "the estate of Leary has established a claim on the stock in question which is superior to the claim of the United States." It remains to determine the extent of that superior claim, that is, the reimbursement to which the estate is entitled.

The decree under review allows the estate only the $40,802.00 paid by it on July 26, 1910, with interest from that date, less the sum of $30,000.00 paid on account in

December, 1917, when the stock was sold by consent and the proceeds brought into court, and less also a clerk's poundage fee of one per cent, under Section 828 of the Revised Statutes. The balance of the fund, less the poundage thereon, was directed to be paid to the United States.

As this statutory fee is properly exacted from the person to whom the impounded money is paid, we think it was clearly correct to deduct one per cent from the amount which each party received, and we perceive no reason why the Government's share should be diminished by the poundage fee on the estate's share. Besides, if poundage be an item of taxable costs, like other required payments to the clerk, and recoverable as such from the losing party, as seems to be assumed in *Blake v. Hawkins*, 19 Fed. 304, its allowance to the estate in this proceeding would be in effect to charge the Government with costs, which is in no case permissible.

The trial court held that the indemnity contract covered the reasonable expenses, including counsel fees, incurred by the estate in defending the suit of the United States on the forfeited bond; but the record indicates that those expenses had been paid by Greene. It appears, however, that after the judgment in that suit was recovered some proceeding to compel its payment was instituted in the Surrogate's Court of New York, in which the Leary estate was then in process of administration. In resisting that proceeding the estate expended the sum of $591.46, admitted to be reasonable in amount, which it now seeks to have refunded. We deem it not doubtful that this claim was rightly disallowed. The liability of the estate was definitely established by the judgment, which was not challenged by appeal, and no good reason appears for attempting to defeat or delay its collection. This being so, it seems evident that the indemnity fund should not be charged with an unwarranted outlay.

We come then to the principal claim of appellants, rejected by the court below, namely, that the Leary estate is entitled, as against the United States, to be reimbursed for its expenses and counsel fees in prosecuting the intervention, and thereby establishing the validity and priority of its lien. The Government first urges the objection, which applies also to the $591.46

above mentioned, that this claim cannot be considered because not set up in the amended petition, which, save that it prays for general relief, demands repayment only of the judgment obtained by the United States. This objection loses its force when the exact status of the litigation is taken into account. The first appeal involved merely the right of the estate to intervene, which the Supreme Court sustained, and nothing else was decided. The second appeal turned on the question whether the evidence adduced was sufficient to prove an agreement to indemnify Leary, and whether the indemnity fund was represented by the Norfolk & Western stock. On this question the trial court ruled against the estate; but it was held on appeal, as above recited, that the estate had established a claim superior to the claim of the United States. There was no determination of the scope of that claim, for occasion did not arise to construe the indemnity contract in that regard. It was therefore proper for the court below, to which the cause was remanded, to permit an amendment of the petition, or to treat it as amended, so as to include a claim which is but incident to the main demand of the intervention. We think it should be examined on the merits.

The contract of indemnity appears in certain letters which Kellogg wrote to Leary in reference to signing the bail bonds of Greene. In the first of these, under date of December 14, 1899, he specifies the securities which Greene had placed in his hands, "as indemnity to you for becoming his bondsman". * * * "It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be established, that it is to be applied in payment of your obligation." And later, in May, 1901, when another bond was required, he says: "It will be necessary to renew the bail given by you for Capt. Greene, and for which I hold the security for your protection." But how can it be said that this promise of indemnity and protection includes the expenses here in dispute? Such an outlay is certainly not within the express terms of the undertaking, and in the nature of the case could not have been contemplated by the parties. As the estate's right to reimbursement rests wholly and of necessity upon Leary's want of knowledge that the Government could have any claim upon the stock pledged for

his security, it is impossible to assert that the expenses incurred in contesting that claim, when it was subsequently made, were intended to be covered by the indemnity agreement; and that contention of appellants may be passed without further comment.

It is argued that the claim in controversy should be sustained because Greene's pledge of stock carried an implied warranty of title, and Leary acquired the rights of an innocent purchaser for value. If both propositions be accepted, and their correctness need not be questioned, we have to consider what warranty was implied by the pledge, and whether, as the matter turned out, Leary's estate had any cause of action against Greene. It seems to be well settled that in such case the implied warranty is, not that the pledgor has good title, but that good title will be conferred on the pledgee. There is no warranty that the property pledged will not be claimed by a third party, and therefore no breach of the contract unless such a claim be successfully asserted. The warranty implied in the sale or pledge of personal property is like the covenant of general warranty in a conveyance of real estate, which is not broken except by eviction of the grantee under a paramount title. That is to say, the pledgor's implied warranty makes him liable to the pledgee only in case the latter loses the property to a stranger who establishes a better right to it.

In 35 *Cyc.* 416, where numerous decisions are cited, the rule in regard to the warranty implied on a sale of personal property is thus stated:

"A warranty of title refers only to the condition of the title at the time of the sale, and is a warranty only against a superior title, or existing encumbrances, and not that the title will not be disputed."

But Leary did not "lose the property." On the contrary, as the courts have conclusively held, he got a perfectly good title even as against the United States, with whose stolen money Greene had purchased the pledged securities. True, his title was assailed, and in defending it his estate incurred expenses of considerable amount for counsel fees and the like. But as the defense was wholly successful and Leary's title adjudged to be superior to that of the adverse claimant, there was no breach of Greene's implied warranty of title, and

consequently that warranty did not of itself make him liable for the expenses of the litigation. It follows of course that those expenses cannot be charged upon that share of the indemnity fund which, subject to the prior right of the Leary estate, belongs to the United States as in law the successor in interest of Greene. In short, the doctrine of implied warranty does not sustain the appellants' contention.

The further argument is advanced that in the Government's suit to recover the stock Kellogg's attitude, as disclosed by his answer and otherwise, was unfriendly and even hostile to the Leary estate; that as trustee of the indemnity fund he failed to do what he should have done to assist and protect the estate; that in consequence it became necessary for the estate itself to intervene in that suit; and that therefore the estate is entitled to recover the expenses which it is alleged would have been allowed to Kellogg out of the fund if he had performed his duty. But this argument rests on an assumption which seems to us clearly erroneous. If Kellogg had from the first actively aided the estate, and in a contest in the original suit, substantially like that which actually followed the intervention, had established the validity of the Leary claim, on what theory would his expenses have been chargeable upon that part of the fund adjudged in the same suit to belong to his adversary? In that event his expenses would have been payable from the moneys awarded to the estate, because incurred in benefitting the estate, but we are aware of no rule of law under which they could have been ordered paid out of the moneys awarded to the United States.

In the last analysis the case at bar involves no unfamiliar principle. One of the parties to the controversy, the United States, claimed all the Norfolk & Western stock, now represented by the fund in court; the other party, the Leary estate, claimed the greater part of it. The courts have decided that the estate has the superior claim to such portion as will discharge the obligation incurred by Leary in becoming bondsman for Greene, and that the balance of the fund belongs to the United States. The contest has been greatly prolonged and the estate put to heavy expense. But the case is by no means exceptional in that respect. It usually happens that the successful litigant gets less in net results

than is adjudged to be his due, because he must himself pay the lawyer who won his suit. The costs that can be taxed against the losing party—and none at all can be taxed against the Government—are little more than nominal, and the winner is therefore out of pocket for the fees of his counsel. If this be unjust to the one found to be in the right, it is because the law gives him only the amount of his recovery and the scanty sum allowed as taxable costs. We find no authority for subjecting the defeated party to any greater liability. In *Hanenstein* v. *Lynham*, 100 U. S. 483, 491, the Supreme Court said: "It is a settled rule in this court never to allow counsel on either side to be paid out of the fund in dispute." To the same decisive effect are, among others, *National Bank* v. *Whitney*, 103 U. S. 99, 104; *Hobbs* v. *McLean*, 117 U. S. 567, 582; *Riddle* v. *Hudgins*, 58 Fed. 490, 494; and *Pike* v. *Cincinnati Realty Co.*, 179 Fed. 97, 103.

The claim for expenses here considered is clearly not within the terms of the indemnity agreement, and we are persuaded that it cannot be sustained on the theory of Greene's implied warranty of title, nor yet on the theory of subrogation to the supposed rights of Kellogg, if he instead of the estate had carried on the litigation. Whatever its hardship, it is simply the case of a successful suitor whom the law compels to pay his own counsel.

Affirmed.

DECREE.

Filed and entered January 20, 1919.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 1640.

Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, Appellants,

vs.

The United States of America, Appellee.

Appeal from the District Court of the United States for the Western District of Virginia.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court that the decrees of the said District Court, in this cause, be, and the same are hereby, affirmed.

January 20, 1919.

MARTIN A. KNAPP,
U. S. Circuit Judge.

PETITION FOR APPEAL.

Filed February 6, 1919.

In the United States Circuit Court of Appeals for the Fourth Circuit.

Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, Appellants,
versus
The United States of America, Appellee.

The above mentioned Appellants, Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fourth Circuit, and that a decree has therein been rendered on the 20th day of January, 1919, affirming the decree of the District Court of the United States for the Western District of Virginia, and that the matter in controversy in said suit exceeds $1,000.00, beside costs; that this cause is one in which the United States Circuit Court of Appeals for the Fourth Circuit does not have final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States of Appeal.

Wherefore the said Appellants, Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, pray that an appeal be allowed in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, to send the

records and proceedings in said cause with all things concerning the same to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors, herewith filed, by the said appellants, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

A. E. STRODE,
J. T. COLEMAN, JR.,
Attorneys for Appellants.

ASSIGNMENT OF ERRORS.

Filed February 6, 1919.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, Appellants,
versus
The United States of America, Appellee.

The appellants in the above entitled cause, in connection with their petition for appeal herein, present and file therewith this, their assignment of errors, as to which matters and things they say that the decree entered herein on the 20th day of January, 1919, is erroneous.

First: The said Circuit Court of Appeals erred in holding and deciding that, from the entire amount decreed to the said Daniel J. Leary and George Leary, administrators, as aforesaid, should be deducted one per cent, and in not holding that the entire sum of $40,802.00 with interest from the 26th day of July, 1910, until paid, should be paid to the said administrators without deducting therefrom the aforesaid one per cent.

Second: The said Circuit Court of Appeals erred in holding and deciding that the said Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, were not entitled to the costs and expenses incurred by the Leary estate in establishing the prior right and equity of the said Leary estate, to the fund in litiga-

tion, arising from the sale of the four hundred shares of Norfolk and Western Railroad stock, and from the accumulated dividends thereon and in not decreeing to the said Leary estate in addition to the sum above set out, a sum sufficient to cover the necessary expenses, counsel fees and costs necessarily incurred by the said Leary estate in establishing the prior right in the Leary estate to the said funds in litigation, prior to the rights of the United States of America, and of other parties.

Third: The said Circuit Court of Appeals erred in holding and deciding that the said administrators of James D. Leary, deceased, were not entitled to receive, as counsel fees, costs and disbursements, in defending the action brought by the United States against the said James D. Leary, on the bail bond given by Benjamin D. Greene and James D. Leary, the sum of money amounting to $591.46, claimed and proved by the said administrators and in failing to decree that the said sum be paid to the said administrators out of the fund in the hands of the Court.

Fourth: The said Circuit Court of Appeals erred in holding and deciding that the balance of the fund in Court arising from the proceeds of the sale of four hundred shares of Norfolk and Western Railroad stock, and from the accumulated dividends, income and profits thereon, after the payment to the Leary estate of the amount decreed to the said Leary estate, was the property of the United States free from the claim of all other parties to this suit and their agents, attorneys and privies and in not holding and deciding and decreeing to the said administrators the necessary amount expended in this litigation by the Leary estate in establishing their prior equity in the fund arising from the sale of the Norfolk and Western Railway stock and accumulated dividends, income and profits therefrom.

Wherefore, the said Daniel J. Leary and George Leary, administrators of James D. Leary, deceased, pray that for the errors aforesaid, and for other errors appearing on the records of the United States Circuit Court of Appeals, for the Fourth Circuit in the above entitled cause to the prejudice of the said appellants, the

said judgments and decrees of the said United States Circuit Court of Appeals of the Fourth Circuit entered therein January 20th, 1919, in said cause be reversed and that the appellants may have an adjudication and decree in their favor as herein specified, and that said cause be remanded to the United States District Court for the Western District of Virginia, with instructions for such further proceedings in said cause as may be determined to the end that justice may be done in the premises.

DANIEL J. LEARY and
GEORGE LEARY,
Administrators of James D. Leary, deceased,
Appellants.
By A. E. STRODE and
J. T. COLEMAN, JR.,
Counsel for Appellants.

ORDER ALLOWING APPEAL.

Filed February 6, 1919.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 1640.

Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, Appellants,
versus
The United States of America, Appellee.

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg.

It is Ordered that the appeal in the above entitled cause to the Supreme Court of the United States be, and the same is hereby, allowed as prayed, upon the execu-

tion of a bond in the penalty of $1,000.00, conditioned according to law.

February 6, 1919.

MARTIN A. KKNAPP,
Judge of the United States Circuit Court of Appeals
for the Fourth Circuit.

CITATION.

Issued February 6, 1919.

UNITED STATES OF AMERICA, SS:

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the United Circuit Court of Appeals for the Fourth Circuit, wherein Daniel J. Leary, and George Leary, Administrators of James D. Leary, deceased, are Appellants, and you are Appellee, to show cause, if any there be, why the decree rendered against the said Appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin A. Knapp, Judge of the United States Circuit Court of Appeals for the Fourth Circuit, this sixth day of February, in the year of our Lord one thousand nine hundred and nineteen.

MARTIN A. KNAPP,
Judge United States Circuit Court of Appeals,
Fourth Circuit.

SERVICE OF CITATION.

STATE AND COUNTY OF NEW YORK.

I hereby acknowledge service upon me of the within Citation and receipt of a copy thereof, this Feby. 8th, 1919.

MARION ERWIN,
Special Asst. to the Atty. Gen'l U. S.,
Solicitor of Record for the United States.

BOND.

Filed February 6, 1919.

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Daniel J. Leary and George Leary, Administrators of James D. Leary, deceased, Appellants,

versus

The United States of America, Appellee.

Know all men by these presents, that we, J. T. Coleman, Jr., and the Globe Indemnity Company, a corporation doing business in the Western District of Virginia, are held and firmly bound unto the United States of America, in the sum of One Thousand Dollars ($1,000.00) to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this third day of February, 1919.

Whereas, the appellants in the above entitled suit seek to prosecute their appeal to the Supreme Court of the United States, to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Fourth Circuit on the 20th day of January, 1919.

Now, Therefore, the condition of this obligation is such, that if the said appellants shall prosecute their said appeal to effect, and answer all costs and damages that may be adjudged, if they fail to make good their appeal, then this obligation shall be void, otherwise to remain in full force and effect.

J. T. COLEMAN, JR. (Seal)
GLOBE INDEMNITY COMPANY,
By G. E. CASKIE, Attorney in fact.

(Seal of Globe Indemnity Company)

Attest:

JNO. M. OTEY.

Approved:

MARTIN A. KNAPP,
U. S. Circuit Judge.

POWER OF ATTORNEY.

Globe Indemnity Company.
Home Office: New York, N. Y.

Know all Men by These Presents: That the Globe Indemnity Company, by K. R. Owen, its Vice-President, in pursuance of authority granted by Section 1, Article LX, of the By-Laws of said Company, a copy of which section is hereto attached, does hereby nominate, constitute and appoint G. E. Caskie, James R. Caskie, John M. Otey and W. D. Campbell, all of the City of Lynchburg, State of Virginia, its true and lawful agents and attorneys in fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed bonds and undertakings of suretyship in penalties not exceeding Fifty Thousand ($50,000.00) Dollars each for Administrators, Executors, Guardians, Conservators, Committees of Incompetents, Trustees, Receivers, Assignees and Commissioners for the sale of Property required to be given by any Statute, Order or Decree of any Court of the State of Virginia or in the United States District Court, for said State, or in Bankruptcy proceedings under the Bankrupt Act of the United States. Bonds in penalties not exceeding Five Thousand ($5,000.00) Dollars each in Attachment, Garnishment, Replevin, Appeal, Supersedeas, Bail, Discharge of Lien and for Costs, required to be given as aforesaid. Bonds in penalties not exceeding Ten Thousand ($10,000.00) Dollars each required to be given by Public Officers, Officials and Employees, whether Federal, State, County or Municipal (except treasurers, sheriffs, constables and officers collecting taxes) in qualifying for office; the said bonds being conditioned for the faithful discharge of their duties and accounting for any paying over the funds coming into their hands as such officers or in such terms as by Statute required. Bonds in penalties not exceeding Twenty Thousand ($20,000.00) Dollars each required to be filed with the Internal Revenue Department of the United States Government. Bonds guaranteeing the faithful performance of contracts for the construction of any work or improvement, or for the furnishing of any supplies, where the contract price does not exceed Fifteen Thousand ($15,000.00) Dollars, and any and all license or

Permit Bonds in penalties not exceeding Five Thousand ($5,000.00) Dollars each, required to be given to the State of Virginia, or any County, City or Town therein. All such bonds and undertakings to be signed for the Company by either the said G. E. Caskie or James R. Caskie, and attested and the Seal of the Company attached thereto by either the said John M. Otey or W. D. Campbell, as occasion may require. And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in New York City, State of New York, in their own proper persons.

In Witness Whereof, the said K. R. Owen, Vice-President, has hereunto subscribed his name and affixed the Corporate Seal of the said Globe Indemnity Company this 11th day of July, 1916.

(Seal) (Signed) K. R. OWEN,
Vice-President.

STATE OF NEW YORK,
County of New York, ss:

On this 11th day of July, A. D., 1916, before the subscriber, a Notary Public of the State of New York, in and for the County of New York, duly commissioned and qualified came K. R. Owen, Vice-President of the Globe Indemnity Company, to me personally known to be the individual and officer described in, and who executed, the preceding instrument and he acknowledged the execution of the same, and being by me duly sworn, deposeth and saith, that he is the officer of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and the said Corporate Seal and his signature as officer was duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at the City of New York, the day and year first above written.

(Notarial Seal) (Signed) T. J. SAVAGE,
Notary Public.

Extract from By-Laws of the Globe Indemnity Company, adopted by the directors of said Company on May 29th, 1912:

"Article IX, Section 1—The President, any Vice-President or the General Manager and Secretary, shall have power and authority to appoint resident Vice-Presidents, resident Assistant Secretaries and Attorneys-in-fact, and to authorize them to execute on behalf of the Company and attach the Seal of the Company thereto, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof."

I, K. R. Owen, Vice-President of the Globe Indemnity Company, hereby certify that the foregoing is a true copy of Section 1, Article IX, of the By-Laws of said Company and is still in force.

In Testimony Whereof, I have hereunto subscribed my name as Vice-President and affixed the Corporate Seal of the Globe Indeminty Company this 11th day of July, A. D., 1916.

(Seal) (Signed) K. R. OWEN,
Vice-President.

I, A. M. Clark, Assistant Secretary of the Globe Indemnity Company, hereby certify that the foregoing is a true and correct copy of Power of Attorney issued on the 11th day of July, 1916, on behalf of G. E. Caskie, James R. Caskie, John M. Otey and W. D. Campbell, all of the City of Lynchburg, State of Virginia, and that the same is still in force.

In Testimony Whereof, I have hereunto subscribed my name as Assistant Secretary and affixed the Corporate Seal of the Company this 11th day of July, A. D., 1916.

A. M. CLARK,
Assistant Secretary.
(Seal of Globe Indemnity Company)

Subscribed and sworn to before me this 4th day of October, 1918.

T. J. SAVAGE

(Notarial Seal.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 24th day of February, A. D., 1919.

(Seal of Court)

CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

No. 314

DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS OF JAMES D. LEARY, DECEASED,

APPELLANTS,

v.

THE UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR DANIEL J. LEARY AND GEORGE LEARY, ADMINISTRATORS OF JAMES D. LEARY, DECEASED, APPELLANTS.

J. P. BELL COMPANY, INC., PRINTERS, LYNCHBURG, VIRGINIA

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STATEMENT.

This case is before this Court for the third time. It arose and has progressed substantially and essentially as follows:

Benjamin D. Greene, when arrested in 1899, upon a charge of conspiring with Oberlin M. Carter and others to defraud the United States, arranged through his attorney, Luther Laflin Kellogg to have James D. Leary become security upon such bail bond as he (Greene) should give in the proceedings against him.

At the same time Greene placed in the hands of Kellogg certain securities for the protection of Leary, the agreement and understanding being, as stated in a letter from Kellogg to Leary, of December 14, 1899, that these securities were placed by Greene in Kellogg's hands "as indemnity to you (Leary) for becoming his (Greene's) bondsman. . . . It is understood that I (Kellogg) am to *hold* these until you (Leary) are released from the said bond, or in case that your liability should be established, that it is to be *applied in payment of your obligation.*"

Subsequently, when upon request Leary renewed the bail bond, he was reassured in letters from Kellogg as to the obligation he was assuming "for which I *hold* the security for your protection," and again, "not that you have to incur any additional liabiliay." (Italics ours.)

(Record, Second Appeal, p. 114.)

Greene absconded, forfeiting the last bond for $40,000, upon which the United States obtained judgment against him and against Leary, his bondsman, and collected a small part thereof from Greene. Leary then dying, the United States litigated with his estate, liability for the balance due upon the forfeited recognizance, and compelled the Leary estate to pay this balance amounting, with interest and costs, to $40,802.00 as of July 26, 1910, on which date it was paid by the Leary estate.

(Record, this Appeal, p. 39.)

Meanwhile the United States, in 1903, had instituted the original suit for an accounting with Kellogg and to have 400 shares of Norfolk and Western Railway Company stock, standing on the books of that company in the name of Kellogg, declared to be the property of the United States because, as was alleged, it had been purchased by or for Greene with the proceeds of funds fraudulently diverted by Greene from the United States.

Kellogg filed an answer under oath setting up, as to the said Norfolk and Western stock, that he held the same as an indemnity fund "and also to secure the payment to the respondent (Kellogg), and to his firm, of the various sums of money that he has advanced, and for services rendered for said Greene in various matters since that time." (Record, Second Appeal, p. 52.) Afterwards Kellogg acknowledged satisfaction from other sources of the claims of himself and his firm, but did nothing toward the protection of the interests of the Leary estate in the suit.

Greene was also made a party defendant but did not appear.

The Leary estate was not originally made a party to this suit, which had progressed until ready for a hearing, when in April, 1908, an intervention bill was filed herein for the Leary estate setting up the aforesaid agreement by Greene, through Kellogg, to indemnify Leary, alleging that the said Norfolk and Western stock was the indemnity fund, and praying that it be applied to the payment of the balance due on the judgment upon the forfeited recognizance, to the exoneration of the Leary estate.

The trial court sustained a demurrer to the intervention bill. (*U. S.* v. *Greene*, 163 Fed. 442.) That ruling was affirmed by the Circuit Court of Appeals (*Leary* v. *U. S.*, 184 Fed. Rep. 433). Upon the first appeal here this Court, reversing both courts below, held that an agreement by an accused to indemnify his bail bondsman in a criminal case was valid, not being contrary to public policy, and that the allegations of the intervention bill were sufficient to warrant an opportunity to prove the case stated. (*Leary* v. *U. S.*, 224 U. S. 567; 56 L. Ed., 889.)

Prior to the first appeal the trial court would receive no proof of any of the allegations of the intervention, and after the first appeal, at the hearing upon the merits, the trial court held that the Leary estate had established no claim whatever upon the securities the Court had impounded.

Upon the second appeal the Circuit Court of Appeals and this Court, reversing the trial court, held that the evidence introduced in support of the intervention was sufficient to establish that the alleged indemnity agreement was made; that it extended to the forfeited recognizance; and that the Leary estate was entitled to an equity in the impounded fund, "superior to the claim of the United States."

Leary v. *U. S.*, 229 Fed. 660;

U. S. v. *Leary*, 245 U. S. 1.

Upon that holding the case went back, after the second appeal, to have the trial court determine the amount due the Leary estate and to apply to the satisfaction thereof so much of the proceeds of the impounded stock as might be necessary. This Court also expressly left to the trial court the matter of an allowance to Kellogg, the trustee.

Thus it was that prior to and upon both of the previous appeals the attention of the parties and of the courts was given only to the adjudication of the question whether the Leary estate had any equity in the stock and if so was such equity superior to that of the United States.

The former appeals determined that question on both branches thereof in favor of the Leary estate.

After the second appeal, when the mandate of the Supreme Court came down, the Leary estate filed a petition in the cause in the trial court praying the proper application to its claims of the fund in Court.

(Record of this Appeal, pp. 6-15.)

Kellogg filed a claim for allowances as trustee. This claim was denied by the trial court on the ground that Kellogg had rendered no service as trustee sufficient to warrant such an allowance from the fund in Court (Record, pp. 24-26). Kellogg did not appeal.

The Norfolk and Western stock was sold under a consent order, the proceeds of which sale, when added to the collection of dividends and interest, and other accretions, made up a fund of about $70,000.00.

(Record, pp. 17-19, 47.)

From this fund the District Court paid the Leary estate $30,000.00 on account of its claim, and afterwards decreed it a further payment of a sum sufficient to make a total of $40,802.00 with interest at 6% per annum from July 26, 1910, this being the amount paid by the Leary estate on the judgment upon the forfeited recognizance, with interest. But (a) the District Court deducted from this amount, applying Sec. 838, U. S. R. S., a tax of one per cent, and also (b) denied the claim of the Leary estate for reimbursement of its costs, counsel fees, and other expenses necessarily and reasonably laid out by it in and about the litigation of the judgment upon the forfeited recognizance, and in this suit in the holding, preservation, administration, and proper application of the trust fund.

(Record, p. 48.)

Moreover (c) the trial court withheld any payment to the Leary estate, in addition to the aforesaid sum of $30,000.00, unless the Leary estate should accept the sum decreed in full satisfaction of its claims. This the Court did upon the insistence of the United States, and against the objection of the Leary estate (Record, p. 56).

As such acceptance of further payment might have foreclosed an appeal it was not accepted.

From this final decree of distribution by the District Court the Leary estate appealed to the Circuit Court of Appeals which affirmed the decree. (Record, p. 67.) 257 Fed. Rep. 246.

The rulings of the District Court last above stated, (a), (b), (c), as affirmed by the Circuit Court of Appeals, constitute the foundation of the Assignments of Error (Rec., pp. 49-51) now to be passed upon by this Court. The Leary estate appeals

in order to have the balance of the fund, this balance amounting to about $11,000.00, which the courts below decreed to the United States, applied to the payment of the aforesaid one per cent withheld by the District Court, and to the repayment, as far as it will go, of the said disbursements made or incurred by the Leary estate because of the failure of the trustee to protect the trust fund and in consequence of Leary's having executed the said bonds under the indemnity and trust agreement with Greene and Kellogg.

In support of this appeal the Leary estate submits the following:

ARGUMENT.

I.

THE TRUST AND THE TRUST FUND.

The trust and indemnity agreement, as established upon the previous appeals, was evidenced by the following four letters: (Record, Second Appeal, pp. 113, 114, 146, 147.)

(Law office of Kellogg, Rose & Smith, Equitable Building, 120 Broadway, L. Laflin Kellogg, Abram J. Rose, Arthur H. Smith, Alfred C. Pette, Philip M. Brett.)

New York, Jan. 19, 1900.

James D. Leary, Esq.,
Hoffman House, New York City.

My dear Mr. Leary: I herewith send you the letter which you were entitled to have in regard to your qualification as bondsman for Captain Greene. I was waiting for you to call for it.

As you see, I wrote the letter the very day that I received the stock.

Yours very truly,

L. Laflin Kellogg.

Encl.

(Law office of Kellogg, Rose & Smith, Equitable Building, 120 Broadway.)

New York, Dec. 14, 1899.

James D. Leary, Esq.

My dear Sir: Captain Benjamin D. Greene has placed in my hands, as indemnity to you for becoming his bondsman in the matter of the United States against Greene, Gaynor, and others now pending in the district court, three hundred shares of the capital stock of the Delaware, Lackawana & Western Railroad Company.

It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be established, that it is to be applied in payment of your obligation. I am,

Yours truly,

L. Laflin Kellogg.

(Kellogg & Rose, attorneys and counsellors at law, Equitable Building, 120 Broadway, New York.)

New York, May 21, 1901.

James D. Leary, Esq.,

17 State Street, New York City.

My dear Mr. Leary: It will be necessary to renew the bail given by you for Capt. Greene, and for which I hold the security for your protection, on Thursday morning next at 10:30.

Will you kindly come to this office for that purpose about 10:15? I am very sorry to trouble you, but it cannot be helped. This new bond is to take the place of the old one without additional liability.

Yours truly,

L. Laflin Kellogg.

Call up Mr. Kellogg.

(Kellogg & Rose, attorneys and counsellors at law, Equitable Building, 120 Broadway, New York.)

New York, June 6, 1901.

James D. Leary, Esq.,
17 State Street, New York City.

My dear Mr. Leary: I am obliged to trouble you again to renew the bond in the Greene and Gaynor matter. I will have to trouble you to be in court between ten and half past ten Saturday morning.

The reason for the matter is not that you have to incur any additional liability, but simply to enable them to carry their case to the United States Supreme Court.

All the parties and all the other bondsmen will be on hand before Judge Lacombe by a special arrangement (as the judge is going away) on Saturday morning at half past ten.

Please let me hear from you to-day, as the matter is most important.

With kindest regards, and hoping that you did not suffer from your misstep in the office, I am,

Yours truly,

L. Laflin Kellogg.

The foregoing letter of December 14, 1899, was inclosed in the letter of January 19, 1900.

Kellogg was Greene's attorney and became also the trustee under the contract evidenced by the letters.

The Delaware, Lackawana and Western Railroad Company stock referred to in the letter of December 14th, through sales, reinvestments, and substitution, was traced into the Norfolk and Western stock impounded and sold in this suit constituting the fund upon which it has been adjudged that the Leary estate has a first lien under the contract evidenced by the letters.

The object of this appeal is to determine the full scope and extent of that contract.

The courts below confined the recovery of the Leary estate to "the necessary and reasonable expenses to which Leary's

representative was put in contesting the suit on the bond," and to the repayment with interest of the amount that the estate was compelled to pay in satisfaction of the judgment upon the bond.

(Record, pp. 22, 69.)

Nothing was allowed in reimbursement to the estate of expenses incurred by reason of the default of Greene and of the trustee in failing to assert and protect the trust, to "hold" the trust fund and thereby to preserve it for the objects to which it was by the agreement of the parties set apart to be held.

By this suit the United States asserted against the trust fund, and all of it, a claim adverse to and destructive of the purposes for which the fund was pledged. It was the duty of the trustee, who was impleaded, to defend against that claim to the end that he might continue to "hold" the fund as agreed. In the making of that defence he was entitled to use the fund in his hands as trustee. The contract of Greene that Kellogg should "hold" this fund, by necessary implication, carried to Kellogg upon his acceptance of the trust the right and duty to hold the fund against any and all adverse claims by whomsoever asserted, and to use the fund in the performance of this duty. As against both Greene and Kellogg, as also against the United States which is entitled only to what may remain of the fund after a settlement between the Leary estate and Greene under the contract, the Leary estate, by reason of its prior equity, had the right to have that duty performed by the trustee and paid for out of the trust fund. Its right to have the expense of performing that duty paid for out of the trust fund cannot be lost through the default of Greene and Kellogg in the performance of that duty casting the burden thereof upon the estate.

If the United States had failed to establish its claim to the stock against Greene and the trustee as such had successfully made that defence, can it be doubted that the trustee would have been entitled to reimbursement out of the trust fund for

the expenses of that defence and that Greene would not be heard to say that such expenses should be paid by the Leary estate with whom he had contracted that the entire fund should be held in trust and for indemnity?

Or, to put it otherwise, divest the case of the features of the controversy between the United States and Greene, as it should be divested *quoad* the claim of the Leary estate which is to be determined as upon a contest between Greene and Leary, it having been adjudged that Leary since he acted in good faith had the right to make the contract he did make. So divested, there is nothing in the case to take it out of the general rule that when one for a valuable consideration places a fund in the hands of a trustee to hold for the protection of another, the whole fund so placed is impressed with a trust, that trust being, first, to meet the necessary expenses of the trust, including the holding against attack of the trust fund and comprehending the compensation of the trustee for such services as he may render together with reimbursement for expenditures incurred in preserving the fund and applying it; second, to indemnify the *cestui que trust*. Not until these two requirements are met can any balance be reclaimed by him who created the trust—in this case Greene, through whom the United States claims.

In the case at bar no claim is now before the Court for trustee compensation. The claim made by the trustee, Kellogg, was denied on the ground that he had rendered no service as trustee that entitled him to compensation. Having rendered no service as trustee, he could have no expense account as such. Consequently, his claims for compensation and for expenses were both denied.

The Leary estate has asserted no claim for trustee compensation. It does claim other trust expenses. In this it recognizes the distinction observed and enforced by this Court in *Trustees* v. *Greenough*, 105 U. S. 527; 26 Law Ed., p. 527. That case is pertinent in several points to the case at bar. As collected in the syllabus it holds in part:

"It is a general principle that a trust estate must bear the necessary expenses of its administration.

"Where a large number of bonds issued by a corporation are secured by a trust fund which is being wasted and misapplied by the trustees, or which they refuse or neglect to apply to the payment of the bonds, a holder of a portion of such bonds who in good faith files a bill to secure the due application of the fund and succeeds in bringing it under the control of the Court for the common benefit of the bondholders is entitled to have his costs, counsel fees, and necessary expenses of the litigation—that is to say his costs as between solicitor and client—paid out of the fund before its distribution.

"Such a complainant, however, is not entitled to an allowance for his private expenses such as traveling fares and hotel bills; nor for his own time and personal services."

The Leary Administrators, Appellants, claim nothing for their private expenses or for their time and personal services required because of the default of the trustee, Kellogg. Such a claim for compensation is personal to the trustee. The parties to the trust agreement would be held to have contracted with that in view—to compensate the trustee, such compensation enuring to the personal benefit of the trustee for services rendered by him. This is not so as to the other trust expenses. The contract to pay them, while incidentally it might operate to the relief of the trustee who serves and in doing so incurs expense, is for the ultimate benefit and relief not of the trustee, but of the *cestui que trust* who is entitled to have such expenses paid out of the trust fund if they be incurred in execution of the trust whether or not the named trustee acts.

The distinction just indicated, between compensation and expenses, appears to have escaped the trial court in thus disposing of the Leary claim on this branch of the case:

"It is argued that Leary's estate should be subrogated to the ... of the trustee. If Kellogg is entitled to any

> allowance, it is because he has by industry, zeal, and fidelity earned it. It is his personal recompense. I can see no sort of equity in taking such allowance and giving it to his *cestui que trust*. If, on the other hand, Kellogg has not earned the right to an allowance, there is nothing to which Leary's representatives can possibly be subrogated." (Rec., p. 24.)

The language used is apposite to a claim for compensation, which the Leary estate did not and does not assert, but does not reach the claim for reimbursement of expenditures.

The scope of the trust here appears in the first of the letters, that of December 14, 1899, set out in full above, evidencing the contract of the parties.

In that letter Kellogg, the attorney for Greene, establishing the trust and accepting the trusteeship, referring to stock that "Captain Benjamin D. Greene has placed in my hands as indemnity to you for becoming his bondsman," says: "It is understood that I am to *hold* these until you are released from the said bond, or in case that your liability should be established, that it is to be *applied* in payment of your obligation." (Italics ours.)

Having so "understood," Leary executed the bond and thus closed the contract.

When a renewal of the bond was required, Kellogg repeats the assurance: "for which I hold the security for your protection."

To conclude from this language that when an adverse claim was asserted against the stock Kellogg, the trustee, was to do nothing to "hold" it as had been contracted is to negative the expressed intention of the parties. Yet to such a conclusion tends the reasoning of the trial court as to what should be held to have been "contemplated" by the parties.

(Record, p. 23.)

The contract contemplated that Kellogg should (1) Hold the stock, and (2) Apply it to the obligation. The payments from the stock of the expense of holding is as much to be implied as is the expense of the selling of the stock, converting it into money, necessary to its application to the satisfaction of the judgment. The courts below admitted the latter implication, but denied the former, though both were necessary to effectuate the trust.

This suit, which is pending in Virginia, involves the disposition of property the situs of which, being stock in a Virginia corporation, is in Virginia. The Virginia statutes provide for the case and declare a rule not in conflict with the rule in New York where the indemnity contract was made and which does not contravene the generally accepted principles of the equity courts in administering such trusts. Whether, therefore, we look to the Virginia statute because it is the local law or because it sets out in apt terms the rule of the equity courts it is illuminating.

By Sections 2441 and 2442 of the Code of Virginia of 1887, it is provided that a trustee in a deed to secure debts or "indemnify sureties," except so far as may be therein otherwise provided, after default, shall sell the property and apply the proceeds, first, to the payment of expenses attending the execution of the trust, and then to the indemnity of the sureties indemnified, and pay the surplus to the grantor. If, as was held by the courts below, the expenses of the trust are to be borne by the *cestui que trust*, Leary, then indeed that which was intended for protection and indemnity would in many cases be barren of the results intended, because such expenses might exceed the amount of the debt secured or the extent of the loss indemnified against. See *New Amsterdam Casualty Co.* v. *Cumberland, Etc., Co.* (C. C. A.), 152 Fed. Rep., at page 963. That is to say, that if the expense of holding the stock, incurred by the Leary estate through the default of Kellogg and Greene

in breaching their contract that the stock should be so held, had exceeded the amount of the balance paid by the Leary estate upon the bail bond judgment, the Leary estate would in the result have received nothing from the fund placed in the hands of a trustee for its benefit, the whole of which under the rule applied by the courts below would have gone, through Greene, to the United States notwithstanding that this Court has held that the Leary estate has an equity in the fund "superior to the claim of the United States."

Leary v. *U. S.*, 245 U. S. 1.

The fallacy of the reasoning of the courts below thus exposed, with deference, rests in their holding that the compensation of the trustee, if he had rendered service, as well as the expense of defending and executing the trust, was chargeable against and should be deducted from the part of the trust fund necessary in amount to repay the Leary estate the amount paid by it on the judgment with interest, the fundamental error being the holding in effect thus disclosed that all of the fund placed in the hands of the trustee for the purposes contracted was not a trust fund.

It is submitted that in the absence of an expressed intention otherwise the whole fund placed with the trustee was thereby impressed with the trust and became applicable to its purposes expressed and implied and reasonably necessary to its execution.

> "The duty of a trustee, whether of real or personal estate, to defend the title, at law or in equity, in case a suit is brought against it, is unquestioned and the expenses are properly chargeable in his accounts against the estate."
>
> *Williams* v. *Gibbes*, 61 U. S. 535; 15 Law Ed. 1013.
>
> *"Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably and properly incur in the execution of the trust, and it is immaterial that there are no provisions for such expenses in the instru-*

ment of trust. If a person undertakes an office for another in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty. . . . *So trustees will be allowed all the expenses of litigation concerning the fund, and all costs which they are ordered to pay to strangers, if the litigation was forced upon them, or was necessary for the protection of the estate.*" (Our italics.)

Perry on Trusts (6th Ed.), Sec. 910.

See also 2 Beach on Trusts and Trustees, Sec. 698.

"It is the duty of the trustee to protect the trust estate from waste, invasion or trespass, and, of course, it would be his duty to defend all suits against him with respect to the trust subject. In the performance of these duties a trustee would be justified in employing counsel and charging their compensation to the trust fund."

Stull v. *Harvey*, 112 Va. 822.

"The general rule that the costs and expenses of necessary litigation carried on by the trustee are payable out of the trust estate, rather than by the trustee personally, is applicable . . . to the defence of actions against the estate. . . . Although the costs and expenses of litigation, outside of taxable costs, are generally allowable out of the trust estate only to the trustee, they may be allowed to one or more beneficiaries who successfully maintain an action to recover or preserve the trust property for the benefit of all the beneficiaries *under circumstances which would have entitled the trustee to reimbursement had he brought the action.*" (Italics ours.)

39 Cyc. 342.

"A *cestui que trust* is entitled to reimbursement out of the trust fund or property for advances and expenditures which he has made at the trustee's request for the purpose of *preserving such property or fund, or which it was necessary for him to make by reason of the trustee's failure or*

neglect to act, and is entitled to a prior lien on the trust property for sums necessarily expended by him for its protection." (Italics ours.)

39 Cyc. 513.

On this branch of the case it is submitted:

(1) The entire fund placed in the hands of the trustee was the trust fund.

(2) The trustee was to (a) Hold it, and (b) Apply it.

(3) All expenses necessary in holding it against attack and in applying it were inherently and by necessary implication charges upon the trust fund, whether expended by the trustee or, upon his default, by the *cestui que trust*.

(4) Here the trustee did default. It was indeed so adjudged by this Court upon the first appeal:

"He (Kellogg) set up that the stock was taken as indemnity to himself for his promise to indemnify Leary, etc., and said nothing about the petitioner's claim. . . . She (the Leary estate) might be bound by a decree against him (Kellogg), but before decree, on discovering his conduct, she may fairly ask a chance to protect herself."

Leary v. *U. S.*, 224 U. S. 566.

(5) Thereupon the *cestui que trust* became entitled to claim reimbursement from the fund in the trustee's hands for expenditures because of his default and for which he would have been reimbursed if he had made them.

II.

THE INDEMNITY.

While it is believed that the foregoing considerations are sufficient in themselves and conclusive upon the issues of this appeal, the conclusions stated above are sustained and fortified by the indemnity features of the contract of the parties.

The understanding and agreement of the parties as appears from the letters and the things done was an *indemnity* agree-

ment and was intended to save Leary harmless from any and all liabilities that might be incurred by him because of his going upon the bail bonds in evidence.

The very first letter, that of December 14, 1899, by express language shows that the agreement was one of indemnity. In the language of the letter, the stock was "placed in my (Kellogg's) hands as indemnity to you for becoming his (Greene's) bondsman."

It has been held by this Court that the agreement was a continuing one and intended to extend, and did extend, to the $40,000 bond. Leary was to be made whole out of the fund to the extent that such fund was sufficient. This is also clear from the letters written subsequent to the letter of December 14, 1899, those of May 21st and June 6, 1901, the one saying, "I hold the security for your protection," and the other, "Not that you have to incur any additional liability."

As defined in the Century Dictionary, "indemnity" means "security given against or exemption granted from damage, loss, injury, or punishment," and "*in law*, that which is given to a person who has assumed, or is about to assume, a responsibility at the risk or for the benefit of another, in order to make good to him any loss or liability which has or may come upon him by so doing."

This definition of indemnity would seem to leave open no question save as to the extent of the loss or damage. In this connection it should be borne in mind that but for Leary's going upon the bail bond the Leary estate would have had to bear none of the expenses to which it has been put and for which it is here asking reimbursement from the trust and indemnity fund and under the trust and indemnity agreement.

The legal term "indemnity" is defined as follows:

> "That which is given to a person to prevent his suffering damage. More specifically it may be defined as the

obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit."

22 Cyc., p. 79.

"Indemnity is that which is given to a person to prevent his suffering damage."

1 Bouvier's Dict. (Rawles Rev., 1010).

"'Indemnity' consists in the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit."

2 Words and Phrases (2d Series), 1033.

"'Indemnity' means reimbursement, making good, recompense for loss or injury."

2 Words and Phrases (2d Series), 1033.

"If the intention to indemnify is reasonably clear it is not necessary that the contract should be drawn in any particular form of words or be technically expressed."

22 Cyc., p. 80.

"An indemnitee is entitled to recover legal costs, including reasonable counsel fees which he has been compelled to pay as a result of suits against him, to enforce the liability indemnified against, provided such suits were defended in good faith with due diligence."

Idem., p. 89.

"A person who is obliged to defend against the act of another, against whom he has a remedy over, may, if the indemnitor has notice of the suit and opportunity to defend, hold him liable not only for the amount of damages recovered but for all reasonable and necessary costs and expenses incurred in such defence, including counsel fees,

> And the same rule is applicable where the person ultimately liable appears and defends the action."
>
> Idem., pp. 97-98.

It follows that Leary may assert against this stock, of which he thus became a purchaser for value without notice, any claim which he might sustain against Greene. This is none the less true, indeed it is but the more true, because of the fact that Greene, though he had notice both of the bringing of the original suit attacking his title to the stock and of the filing of the intervention which showed the jeopardy in which that suit put the claim of Leary thereto, did nothing to defend the suit or to protect Leary's rights and but added another default, the burden of which had to be borne by Leary.

Greene Warranted His Title to the Stock.

By such notice it became incumbent upon Greene to make good the warranty of his title to the stock that was implied in his pledge of it to Leary; and Greene, having defaulted in this duty, which Leary performed for him, is bound to make good the consequent loss, and the stock having been pledged as indemnity may be subjected to that loss because of the indemnity agreement which carried with it the warranty of title.

> "The general rule both in England and this country is now well established, that on a sale of goods there is an implied warranty of title, especially if the sale is for a fair price and the goods were in the possession of the seller at the time of the sale, unless it clearly appears that the seller intended to transfer only such interest in the goods as he may have."
>
> 35 Cyc., p. 394, and cases cited.

> "Upon the question of priority the pledgee stands on the same footing as a purchaser and is deemed a holder for value to the extent of his lien. Therefore, where he re-

ceives possession of the property from the pledgor in good faith, the pledgee takes priority over a prior unrecorded mortgage or lien or over the right of an unpaid seller who has parted with possession of the property."

31 Cyc., pp. 811-812.

Warranty has been defined as: "The obligation by which one contracts to defend another in some action which may be instituted against him; . . . an express or implied statement of something which the party undertakes shall be a part of the contract; . . . a more or less qualified promise of indemnity against a failure in the performance of a term in the contract."

40 Cyc., pp. 492-493.

It should be continually borne in mind that under the ruling of this Court Leary dealt with Greene unaffected by notice of any infirmity in Greene's title to the pledged security (*Leary* v. *United State*, 229 Fed. 660. *United States* v. *Leary*, 245 U. S. 1). The case should, therefore, be judged as if the present controversy were between Greene and Leary and as Greene defaulted in his contracted duty to defend the title to the stock when it was challenged he would not be heard, and the United States would have no better right than *he* to deny the claim for reimbursement arising from his default.

III.

THE RECOVERY.

The items for which the courts below denied the Leary estate recovery from the impounded fund are as follows:

(1) Counsel fees, $500.00, and expenses, $91.46, aggregating $591.46 expended in resisting the collection from the Leary estate of the balance due upon the bail bond judgment.

(Record, pp. 9, 21, 30, 35, 42, 44, 46.)

(2) Fees and expenses of counsel and Court costs incurred or expended in and about this suit in the holding, preservation, and application of the fund, impounded herein, to the trust and indemnity purposes.

An itemized statement of some of the disbursements made by the estate under this head appears in the Record at pages 10 to 14. A full statement and proof of the account does not appear because the trial court in passing upon the "general objections" of the United States (Rec., p. 10) to the petition, by its opinion (Rec., pp. 21-28) and decree of December 20, 1917 (Rec., pp. 20-21), which is one of the decrees appealed from (Rec., p. 50), declined to give the estate an opportunity to offer a full statement and proof thereof because it was of opinion that they were not recoverable, though it granted such opportunity as to other parts of the claim asserted in the petition which it deemed recoverable. (Rec., p. 21.)

(3) The Clerk's poundage fee, under Section 828 of the revised statutes, of one per cent to be deducted from the amount decreed the Leary estate.

Of these in their order:

(1) Greene having absconded, his bail bond to appear in the United States Court for the Southern District of Georgia was there forfeited. Thereon the United States brought an action against the Leary estate in New York. The estate contested liability. The counsel fees and other expenses incurred in that contest the trial court in the present case deemed recoverable if incurred by the estate (Rec., p. 20), notwithstanding that the contest so made was unsuccessful and the United States obtained the judgment (Rec., p. 22), but as the proof tended to show that those fees and expenses had not been incurred by the estate or to the extent that they had been incurred had been otherwise repaid by Greene or Kellogg for him no further recovery on account of them was allowed. To collect the judgment the United States brought proceedings in the Surrogate's Court against the Leary estate. Those proceedings

were contested by the Leary estate which therein disbursed the said amount of $591.46, made up of a counsel fee of $500.00 and $91.46 expenses. The recovery of this expenditure was denied the estate by the courts below on the ground, as stated by the Circuit Court of Appeals, that it was "an unwarranted outlay" (Rec., p. 69).

The courts below do not mention the pertinent consideration that at the time the proceedings and contest were pending in the Surrogate's Court, 1908-1910 (Rec., pp. 32-34), the United States had impounded in the present suit the fund which Greene and Kellogg had contracted, at a time when Leary had the right so to contract with them, should "be applied in payment" of the very "obligation" which was the original foundation of the proceedings before the Surrogate. That fund this Court has held should have been so applied, as it would have been but for the bringing of this suit by the United States and the default of Greene and Kellogg in failing to assert the Leary equity in the stock.

Notwithstanding its subsequent assertion by Mrs. Leary in 1908, shortly after she first learned of its jeopardy (Rec., p. 7) the United States, though thus put upon notice of the right of the Leary estate to have the stock the Government had impounded applied to the obligation, continued to press the Surrogate Court proceedings and compelled the payment by the estate.

The United States is estopped under the circumstances to assert that the resistance to its demand was unwarranted in the absence of bad faith. Those proceedings would not have been brought against the estate but for the liability that Leary assumed upon the bail bond, and against the consequences of that liability he was entitled to the benefit of the indemnity that was pledged to him.

(2) The expenditures claimed against the fund by the Leary estate in and about the present suit are made up of:

(a) Counsel fees, (b) Court costs, and (c) Other expenses incident to the litigation, but including no compensation to the Leary representatives nor personal expenditures made by them.

As to (a) and (c) the argument hereinbefore set out in support of their payment under the trust and indemnity agreement is deemed sufficient.

As to (b) both courts below suggest as one reason for its disallowance that costs cannot be "taxed" against the Government (Rec., pp. 24 and 72). That reason might be sound and sufficient if a personal decree, so to speak, were asked for against the United States for costs. That is not this case.

Here is asserted not a claim against the United States but against a fund in Court. The claim is based on no right as against the United States except upon that equity in this fund which this Court has held is "*superior*" to that of the United States.

This distinction between taxable costs for which a personal decree may or may not be granted and costs as a part of expenses chargeable against a fund is recognized in *Trustees* v. *Greenough*, 105 U. S. 527, 26 Law Ed. 1158. There the jurisdiction was challenged upon the ground that the appeal involved only questions growing out of allowances of costs which were not appealable. In overruling this contention the Court said:

> "The question in this case is one of costs, expenses, and allowances awarded to the complainant below out of a trust fund under the control of the Court. Ordinarily a decree will not be reviewed by this Court on a question of costs merely, in a suit in equity, although the Court has entire control of the matter of costs, as well as the merits, when it has possession of the case on appeal from the final decree. But it was held by Lord Cottenham in the case of *Angell* v. *Davis*, 4 Myl. &c., 360, that when the case is *not one of personal costs, in which the Court has ordered one party to pay them but a case in which the Court has*

directed them to be paid out of a particular fund, an appeal lies on the part of those interested in the fund." (Our italics.)

The rule forbidding the taxing of costs against the Government rests upon its sovereignty and the absence of a fund against which the decree may be enforced. When the reason for the rule fails the rule falls.

> "No direct suit can be maintained against the United States. But when an action is brought by the United States to recover money in the hands of a party who has a legal claim against them it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to Congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to Congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defence to a suit by the United States."
>
> *U. S.* v. *Ringgold*, 8 Pet. 150.

The same reasoning is applicable where a party has a claim founded upon contract to a fund upon which his claim is superior to that of the United States.

The case on this point comes back, therefore, to the question whether under the trust and indemnity agreement expenditures reasonably and necessarily made under that agreement constitute charges upon the impounded fund.

No recovery is here sought of costs as costs in the sense of asking for a personal decree against the United States therefor or having the Court "tax the costs."

Included among other necessary expenditures making up the total of disbursements made by reason of a breach of the trust and indemnity contract happen to be certain sums paid for Court expenses.

"The person indemnified by such an agreement is entitled to recover the amount of the recognizance, and the costs of taking judgment thereon, together with interest from the date of payment."

Keesling v. *Frazier* (Ind.), 21 N. E. Rep. 552.
See also 22 Cyc., p. 89.

The case of *Ordinary* v. *Connolly*, 75 N. J. Eq. 521; 72 Atl. 636, 138 Am. St. Rep. 577, involved the holding of sureties upon an administrator's bond for expenses growing out of the failure to discharge his duty upon the part of the administrator. The Court held: It is "clear upon reason and authority that a reasonable counsel fee, necessarily incurred in the removal of an administrator, is recoverable as a part of the damages resulting from his dereliction and sustained by occasion of the breach of the condition that he would well and truly administer the estate, or the breach of any of the other conditions, and for which purpose the Ordinary may have the whole penalty of the bond, if necessary, as we have seen."

In reviewing the authorities the Court said (138 Am. St. Rep., p. 580):

"In *Ellis* v. *Norman* (Ky.), 44 S. W. 429, the Court of Appeals of Kentucky held that the surety of a forfeited bail bond is entitled to reimbursement out of the indemnity given him by the principal to the extent of attorneys' fees and other expenses incurred by him in good faith. As to the recovery of expenses on a forfeited bail bond, see also *Fisher* v. *Fallows*, 5 Esp. 171, and *Sparkles* v. *Martindale*, 8 East. 593."

(3) If Section 838 of the Revised Statutes be applicable to the fund in Court in this case the poundage tax of one per cent is not chargeable against the Leary estate's interest in the fund, but constitutes merely an expense item involved in the execution of the trust by the Court payable from the general

trust fund accordingly upon the same principles that support reimbursement to the *Leary estate of other trust* expenses.

IV.

SUMMARY.

Upon the whole case appellants submit that again, as was said by this Court upon the first appeal, they have been by both courts below "dealt with too technically." *Leary v. United States*, 224 U. S. 575; 56 Law Ed., at p. 892.

There also this Court said, "it was not laches in her to assume that Kellogg would do his duty as her trustee." That duty, of course, was to assert and defend the trust for the Leary estate, using therefor the trust fund, the right to do this being *"inherent"* in the trust agreement of the parties. Yet the trial court says:

> " . . . It is, therefore, impossible to say that any one of the three persons concerned in the making of the agreement of indemnity contemplated and intended to provide for the expenses of a suit by the Government asserting a claim to the stock." (Rec., p. 23.)

The necessary inference from this language is that the Leary estate had no inherent or implied rights under the trust agreement but that all rights thereunder must be expressly and specifically set out therein. Such we have seen is not the law. Certainly no such rigid construction should be placed upon a trust agreement to which was added the purpose to indemnify the beneficiary against loss under the circumstances appearing in this case. The same erroneous conception of the rights of the Leary estate appears in the opinion of the Circuit Court of Appeals:

> "But how can it be said that this promise of indemnity and protection includes the expenses here in dispute?

> Such an outlay is certainly not within the express terms of the undertaking, and in the nature of the case could not have been *contemplated* by the parties." (Italics ours.) (Rec., p. 69.)

It may be that this particular contest was not "contemplated" by Leary or Kellogg, but with the knowledge which Greene must now be presumed to have had of the infirmity of his hold upon the stock he must be held, other considerations aside, to have contracted that in pledging the stock it should be held against this as well as any other claim that might be asserted to deprive the trustee of his hold upon it.

The language last quoted also leaves out of view the trust agreement between the parties. In treating of that aspect of the matter the Circuit Court of Appeals says, assuming that Kellogg had discharged his duty as trustee: "In that event his expenses would have been payable from the moneys awarded to the estate, because incurred in benefitting the estate, but we are aware of no rule of law under which they could have been ordered paid out of the moneys awarded the United States." (Rec., p. 71.)

This language, with deference, begs the question. There could be no moneys to award the United States until after the trust and indemnity demands were fully satisfied. It reflects also, as do other parts of the opinions of both courts below, the idea that because the United States is the "adversary" and has established a claim to the stock as against Greene it may defeat claims of the Leary estate against the stock which Greene could not deny. As has been pointed out, so to hold is to deny to the Leary estate the benefit of the superior claim this Court has held it had to the stock.

Nor, therefore, again with deference, is this "simply the case of a successful suitor whom the law compels to pay his own

counsel." If the payment of counsel be comprehended within expenditures which the law holds within the contemplation of the parties to a valid trust and indemnity agreement, as inherent in the arrangement contracted, the law in execution of the contract will compel such payment from the fund pledged by the contract.

The case here presented is one which, "unless read with an adverse mind," to borrow again from the language of this Court upon the first appeal, discloses a contract which read as one "would read an untechnical document" contemplated complete protection to Leary. For his relief the stock was placed in the hands of a trustee both to "hold" and to apply. It was not contemplated even that Leary must first pay the bond before becoming entitled to the indemnity. The fund was to "be applied in payment of your obligation," without any attention to the matter on the part of Leary, the trustee being charged with a comprehensive duty both to hold and to apply the stock. Such is the clearly disclosed intention of the parties, to the effectuation of which the Leary estate has established its right.

V.

CONCLUSION.

The case should be reversed and remanded to the trial court with directions:

> First: To decree to the Leary estate from the funds in Court in this cause the payment of the sum of $40,802.00, principal, with interest thereon at six per centum per annum from the 26th day of July, 1910, until payment, subject to a credit only of $30,000.00 paid under the decree of December 1, 1917 (Rec., p. 15), and without deduction of a poundage tax from this or any other payment decreed the Leary estate.

> The estate should not suffer any prejudice by reason of its refusal to accept the payment provided for by the final decree of distribution of March 15, 1918, which provided that such payment should be made "as full payment of all claims of whatever kind of the estate of James D. Leary, deceased, on the fund in Court." (Rec., p. 48.)

This, as has been pointed out above, was upon the insistence of the United States and over the objection of the Leary estate which desired to have a further payment then provided for of so much as was not in dispute and would not be appealed from by the United States—and it has not appealed—without prejudice to the right of the Leary estate to appeal from so much of the decree as it was advised was erroneous. It had been provided in the decree of December 1, 1917, directing the payment of the said sum of $30,000.00 on account "that the payment of the said sum to the said intervenors in manner aforesaid shall be without prejudice to the rights of any of the parties to the suit, and be considered merely as a payment on account of the claims of the said intervenors." (Rec., p. 16.)

The effect of the refusal of the trial court, upon the insistence of the Government that the Leary estate be not "allowed to take the full sum decreed them from July 26, 1910, and then tie up the balance of the sum decreed to the Government" (Rec., p. 57), to insert a similar provision in the decree of March 15, 1918, was to jeopardize the right of appeal, or penalize by the forfeiture thereof, in the acceptance of a further payment on account to which at that time the estate was indisputably entitled.

> Second: To decree to the Leary estate reimbursement from the said fund of the aforesaid sum of $591.46 expended by it in resisting the collection of the balance of the judgment upon the bail bond.
>
> Third: To decree to the Leary estate reimbursement from the said fund of its expenditures disbursed or in-

curred in and about the present suit, in execution of the trust and indemnity agreement, including Court costs and such reasonable counsel fees as should be allowed under the trust and indemnity agreement.

Respectfully submitted,

J. T. Coleman, Jr.,
Aubrey E. Strode,
Solicitors for Appellants.

March 13, 1920.

IN THE

Supreme Court of the United States

No. 314.

DANIEL J. LEARY and GEORGE LEARY,
Administrators of JAMES D. LEARY, Deceased,
Appellants,

vs.

THE UNITED STATES OF AMERICA.
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE FOURTH CIRCUIT.

Brief of Marion Erwin, Special Assistant to the Attorney General, for the United States, Appellees.

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TABLE OF CASES.

IN THE

Supreme Court of the United States

October Term, 1919.

No. 314.

DANIEL J. LEARY and GEORGE LEARY, Administrators of JAMES D. LEARY, Deceased, Appellants, vs. THE UNITED STATES OF AMERICA, Appellee.	Appeal from the United States Circuit Court of Appeals, Fourth Circuit.

BRIEF FOR THE UNITED STATES.

Statement.

This case has been before the Circuit Court of Appeals and the Supreme Court twice before and is now before this Court for the third time.

The original bill was filed by the United States December 19, 1903, against Benjamin D. Greene, L. L. Kellogg and the railroad company in the United States Circuit Court for the Western

District of Virginia to subject to the claims of the United States against Greene as investments of diverted trust funds, some $40,000 par value of Norfolk & Western stock then standing in the name of Kellogg and for an accounting from Kellogg for that and other assets alleged to be in his hands, holding the same for Greene. Kellogg set up a lien claim on the said Norfolk & Western stocks in himself, and denied the other liability. The testimony was taken and the case was ready for trial, when Mary C. Leary, the first administrator of the Leary Estate, petitioned for leave to intervene, setting up a superior lien on the stock under an indemnity contract as bail for Greene alleged to have been given by B. D. Greene to James D. Leary. On demurrer to that proposed intervention, the District Court denied leave, and this was affirmed by the Circuit Court of Appeals—

Leary vs. United States, 184 Fed., 443,

and reversed by the Supreme Court, which directed that leave to file the intervention be granted.

Leary vs. United States, 224 U. S., 567.

The representative of the Leary Estate then on May 13, 1913, filed in the District Court their amended intervention, the 13th paragraph of which was as follows:

> *"Thirteenth:* That on or about the 10th day of September, 1903, the United States of America, brought suit against the intervenor in the Circuit Court of the United States for the Southern District of New York, upon said recognizance of $40,000 above referred to, to

recover the amount; that such proceedings were fully had in said Court as that a judgment was entered in said Court on or about the 6th day of January, 1908, in favor of the United States of America and against the intervenor upon said recognizance for the sum of $35,377.46, which said judgment amounting with costs and interest to the sum of $40,802.00, was paid by intervenor to the United States on or about Dec. 31, 1910."

(Printed Record in this Court on second appeal page 75).

The said amended intervention prayed that a decree be entered decreeing to the intervenor that the 400 shares of the stock of the Norfolk & Western Railway Company, with such accumulated dividends or so much as may be necessary in order to secure repayment to the intervenor of the sum of $40,802, *together with interest from December* 31, 1910, be transferred and turned over to intervenor. This constituted "the Leary Claim."

The answer of the United States in its 9th paragraph specifically admitted the averments of the 13th paragraph of said amended intervention.

(Printed Record in this Court, 2nd appeal, page 84.)

The Leary estate relied upon this admission and went to final trial, on the merits without offering any other testimony to prove the said allegations of the 13th paragraph. The exact amount of the Leary Claim, the principal amount and the time, December 31, 1910, from which it was claimed the interest should be computed if Leary was entitled to recover, was admitted and, therefore, not in dispute at the final hearing. The District Court on

the final hearing on the merits rendered its Final Decree Dec. 13, 1913, holding that the claims of the United States were superior to the claims of all other parties to the suit to the stock and its proceeds in controversy. It was decreed that "The respective parties shall pay their own costs."

(Printed Record, 2nd appeal in this Court, pages 129-131.)

That decree was against the Intervener Leary not on demurrer, not on motion to dismiss, but after full hearing and submission and consideration of all the evidence offered by Intervener on the merits on examination and cross examination (Record, 2nd appeal, page 103) and after the case on the evidence was closed it was opened by the Court at the trial and new evidence was allowed to be put in by Intervener.

It is obvious that whatever view the Court may have taken of the sufficiency or insufficiency of the proof offered by intervener on the question of proof of the claimed indemnity contract, it would have been the duty of the Court to have denied all relief to intervener, unless definite proof of the allegations of the said 13th paragraph of the intervention had not been submitted. That proof consisted of the said allegations of the definite amount which Leary had paid on the recognizance, obligation, principal and interest, and the admission in the Government's answer of the truth of that allegation.

That the Leary's relied upon that averment and the admission in the answer of the United States before the Circuit Court of Appeals and before this court on the second appeal as to the establishment of their claim on the hearing on the merits, appears in their brief filed on the appeal to this

court at October Term, 1917, in No. 194, at pages 12 and 13.

On appeal from the decree of December 13, 1913, to the Circuit Court of Appeals entered by the Leary Estate, followed later by an appeal by Kellogg, that Court rendered a decree or decrees November 12, 1915, which contained the words,—

> "On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby reversed; and that this cause be and the same is hereby remanded to the District Court of the United States for the Western District of Virginia, for further proceedings *in accordance with the opinion* of this Court."

(Printed Record of the present appeal, page 2, and Record of second appeal, page 151.)

The opinion of the Circuit Court of Appeals which is made part of its said decree is reported:

Leary vs. U. S., 229 F. R., 660.

(And record 2nd appeal, page 144.)

A summary of the conclusions reached by that Court, on the questions involved, is shown by the following extracts from that opinion, the references being to the pages of 229 Fed. Rep.

After referring to the opinion of the Supreme Court on the first appeal that the petition filed by Mrs. Leary "showed a right to intervene," it referred to the averment of her amended petition "that she had paid the judgment of the United States against the Leary estate."

That reference could have been to nothing else but to the 13th paragraph of the intervention, hereinbefore referred to, the truth of which was admitted in the Government's answer. It was because of those averments and the admission that the Court did not further concern itself with the sufficiency of Leary's proof as to the amount and extent of her claim. That Court said, however, "There was a full hearing in the court below."

The Court said, page 661:

> "It follows from this that the intervention cannot be sustained on the theory that the United States has failed to prove with requisite certainty that moneys stolen from it are represented by the stocks in question, and nothing further can be said upon that branch of the case."

Page 664:

> "Indeed, it is inferable from the record, as we understand it, that Kellogg does not now assert any personal claim to the fund in litigation except perhaps for such sum as he may ask to have allowed for counsel fees and expenses in protecting his trust."

Page 666:

> "Moreover, Greene had long before suffered default and the Government had taken a *pro confesso* decree against him. *This operated to divest him of any interest in the stock, certainly as against the United States,* and it is only in a technical sense that he can

be said to be a necessary party to the intervention. The contest here is between Leary's estate and the Government, and the Government is protected from Greene by the *pro confesso* decree whether the estate wins or loses."

Page 666:

"For the reasons above stated we are of the opinion that the *estate of Leary has established a claim* to the stock in question which is superior to the claim of the United States, and it follows that the decree appealed from must be reversed."

The opinion and decree were silent as to any award of costs. It did not change that provision of the District Court of December 13, 1913, that the respective parties pay their own costs.

The Appeal to the Supreme Court.

The United States appealed from the decrees of November 12, 1915, of the Circuit Court of Appeals to the Supreme Court, as from a final decree.

Motion by Appellee to Dismiss Appeal on Ground That Decree was not Final Denied.

At the October Term, 1916, of the Supreme Court the representatives of the Leary estate and Kellogg joined in a motion to dismiss the Government's appeal.

"On the ground that this Court has no jurisdiction of the same in that the appeal taken

to this Court is not from a final judgment or decree."

The Government contended that the decree of the Circuit Court of Appeals was final, that the averments of paragraph 13th of the invention which fixed the amount paid out as alleged December 31, 1910, by Leary for principal, interest and costs on the suit in the United States Circuit Court on the bail bond at $40,802, and the claim of interest from that date, made the claim of the Learys a certain and definite claim, and the admission of those facts in the Government's answer, dispensed with proofs, and the District Court had nothing to do but pay the Learys the $40,802 with interest from December 31, 1910. The Supreme Court sustained the position taken by the United States that the decree was final, and denied the motion, without opinion. The case was then assigned for hearing.

The appeal was then argued and decided on the merits, and the decree of the United States Circuit Court of Appeals affirmed.

United States vs. Leary, 245 U. S., 1.

The opinion of the Supreme Court shows that it was a complete affirmance of the opinion and directions of the Circuit Court of Appeals as to the respective rights of Leary and the United States, and added but one additional direction which related to Kellogg's rights as follows:

"Whether Kellogg should receive an allowance as Trustee may be left to the District Court."

This Court made no award of costs, nor did it change the decree of the District Court in that respect.

The statement in appellants' brief, page 6, that this Court sent the case back "to have the Trial Court determine the amount due the Leary estate" in the sense of opening the case for new allegations and proofs on that question is not justified by the record.

The Order on Filing of Mandate.

On November 19, 1917, by consent an order was entered in the District Court making the judgment of the Circuit Court of Appeals and of the Supreme Court the judgment of the District Court, and setting the cause down for hearing for entry or decree or decrees in accordance therewith for November 30, 1917 (Present Record, page 5). That hearing was passed to December 1, 1917 (Record, page 15).

In the meantime on November 21, 1917, Kellogg served on respective counsel a petition for allowance of attorney's fees, costs and disbursements, to him, as Trustee for the interest of the Leary estate in the stocks, for his services and that of his counsel in the litigation in the Virginia suit, he having been finally held to have held the stocks as Trustee for Leary, although his defense through the final trial in the District Court had been made not for Leary but in his own interest and the interest of Greene. To that petition the United States interposed general objections (Present Record, page 52).

At the hearing on November 30, 1917, the intervenors filed and served a petition (present Record,

page 6) claiming to be allowed out of the entire fund in Court the following:

> (1) Counsel fees, court costs and other expenditures made or incurred by the Leary estate in and about its defense of the proceedings by the United States upon the said forfeited recognizance.
>
> (2) Counsel fees, court costs and other expenditures paid or incurred by the said estaté in and about the establishment of the said trust, and in general for the successful conduct of the litigation on the intervention in the Virginia suit.
>
> (3) That it was through error as to date that the intervenors had alleged payment of the $40,802 on December 31, 1910, and asking that the decree be so drafted as to allow the $40,802 with interest from July 26, 1910, when it is alleged in the petition the amount was actually paid.

The petition annexed a statement of alleged disbursements in the intervention suit claimed in addition to counsel fees, the value of which it asked the Court to fix. The United States acknowledged service of said petition on and as of November 30, 1917, with the understanding that general objections were to be considered as filed (Present Record, pages 9-10).

Kellogg submitted his claim for allowances for costs, expenditures and counsel fees on the record of the cause. It was the contention of the United States at that hearing that the Supreme Court had

left nothing open for litigation in the District Court, save the question of the right of Kellogg to compensation, as Trustee, and on the Record, Kellogg was not entitled to such compensation, also that Leary could not by amended pleadings summary petition or otherwise claim more than the amount claimed in his intervention and the interest from the date therein claimed, and as proved by the admission of the United States at the trial on the merits, the decree of the Supreme Court being final. After arguments heard, the Court took all the questions under consideration and reserved its decision.

Decree and Opinion of December 20, 1917.

On December 20, 1917, Judge McDowell rendered a decree in which it was decreed (Present Record, pages 20-21):

> "5th. That the prayers of L. Laflin Kellogg, Esq., for an allowance out of the fund is * * * denied and overruled."

That decree ended all claims of Kellogg and he has not appealed or appeared in the case since.

The decree further provided:

> "4th. That the prayer of the said administrators that the costs and expenses of the Leary estate in this present litigation (meaning the litigation in the suit in Virginia) should be allowed and paid out of the fund, is denied and overruled."

But by said decree it was provided by the first paragraph that—

(a) Interest should be computed in Leary's favor on the $40,802 "from the date on which the personal representative of said James D. Leary paid said sum until payment."

(b) And also that they should be allowed:

> "The necessary and reasonable expenses, including reasonable counsel fees, *laid out by the said Leary's representative in defending* the action brought by the United States against said James D. Leary on the bail bond given by Benjamin D. Greene and James D. Leary and mentioned in the present proceedings."

That decree also in its second and third paragraphs provided a method by which the intervenor could make proof, by depositions, of the facts required by clauses designated (a) and (b) above, to wit: proof of the date when the $40,802 was actually paid, and proof of the dates, amounts and nature of the expenses claimed by intervenor as having been made "in the action brought by the United States on the bail bond." Judge McDowell filed with that decree his well considered opinion giving his reasons for his decree (Present Record, page 21).

The Stipulation of Counsel of January 1, 1918.

In order to save taking proof by depositions the counsel for the United States and Leary entered into certain stipulations which covered the facts

on which Judge McDowell's decree of December 20, 1917, required intervenors to make proof. The first of these stipulations, Exhibit B (Present Record, page 42) established the following facts:

(1) That (page 44),

> "the defense of Mary C. Leary in the suit in the United States Circuit Court for the Southern District of New York up to and including the final judgment of January 6, 1908. was conducted by Kellogg & Rose as attorneys at the instance and expense of Benjamin D. Greene, and not at Leary's expense."

This admission disposed of all claims of the Leary estate for reimbursement of expenses and counsel fees for defense of the suit on the action on the bail bond in the United States Circuit Court, which finally established the obligation of Leary on the recognizance. There was nothing Judge McDowell could allow on that particular claim, and no error is assigned by appellant on that point.

It further appeared from that stipulation (Present Record, page 42) that:

Subsequent to the rendition of the judgment of April 6, 1908, in the United States Circuit Court for the Southern District of New York on the bail bond against Mary C. Leary, Administratrix, the United States filed a petition in the Surrogates' Court for the County of New York, setting up the fact of the judgment, and praying leave to have an execution issued and levied on the property of the Leary estate. Mrs. Leary contested that, but it was finally decided in favor of the United States, May 20, 1910, and the costs awarded by the Sur-

rogate against her *individually*. Without waiting to have execution levied, Mrs. Leary on July 26, 1910, paid the judgment then amounting with interest to $40,802.

It was further stipulated that Mary C. Leary, Administratrix, paid to David McClure, her counsel, for services actually rendered in the Surrogate proceedings $500 for fees and $91.46 for actual disbursements, a total of $591.46.

The United States reserved in the stipulation the contention that such expenditure was not incurred in establishing Leary's liability on the bail bond.

Stipulation of January 5th, 1918.

By the further stipulation of counsel of January 23, 1918 (Present Record, pages 34-36) it was stipulated that the question as to whether the $591.46 was allowable to the Learys out of the general fund under the facts above stipulated, was to be left to the Court to decide as a question of law, and when that question was decided and notice given of it by the Court, that counsel were to draft a final decree of distribution for submission to the Court.

Decision of Judge McDowell, January 23, 1918.

On January 23, 1918 (Present Record, pages 46-47), Judge McDowell gave notice to counsel that in his opinion the items of $591.46 were not allowable against the general fund, and directed counsel to submit the draft of final decree of distribution. Counsel for the United States submitted a draft, conforming to Judge McDowell's ruling, different

from that submitted by the intervenors. The latter submitted a memorandum to support their draft. The gist of the difference in the respective drafts of decrees were that counsel for the Learys so drafted the decree that they were to be paid at once the entire $40,802 with interest from July 26, 1910 (less amounts already advanced Dec. 1, 1917, by consent, while at the same time the United States were to be stayed in getting any part of the remaining fund, until after an appeal should be made by the Learys, should they so elect, on the points on which they felt aggrieved.

Counsel for the United States on February 20, 1918, submitted in opposition a memorandum (present Record, page 55) in which it again reasserted its contention that the District Court had no right to take proof after mandate to change the date from which interest was to be computed from December 31, 1910, as asserted in the intervention, to July 26, 1910, nor to establish any other allowances by way of compensation under the indemnity contract than those stated in the intervention, and which had been proved and relied upon the trial in the District Court on the merits, and stood as the proved Leary claim when the case was before the Supreme Court on appeal from final decree.

The Previous payments to the Leary Estate and Conversion of Assets into Money.

On December 1, 1917, by a consent order (present Record, page 15), $30,000 on account was advanced to the Leary estate out of the general fund on deposit. On December 12, 1917, by a consent order the certificates for $40,000 par value of

the Norfolk & Western stock was directed to be sent to New York by the Clerk and sold through brokers at current market rates, and the money deposited in bank by the Clerk with the other funds subject to check for distribution. This was done and the proceeds $38,384.00 was so deposited in December, 1917 (Record, page 12).

The final Decree of Distribution Dated March 12 and entered March 15, 1918.

Judge McDowell entered the final decree of distribution March 15, 1918, conformably to his previous rulings (present Record, page 45):

(1) It disallowed the $591.46 paid McClure by the Administratrix in the Surrogates' Court.

(2) It gave the Leary estate the $40,802, with $17,986.88 interest from July 26, 1910 to December 1, 1917 (when the $30,000 was paid), and interest on the balance $28,788.88 to March 25, 1918, aggregating $546.97, less the said payment of $30,000, and less 1% Clerk's poundage upon the funds awarded to the Learys received and paid out for their account. In other words, the Learys received the principal sum of $40,802 plus $18,533.85 interest, less $593.35 or $59,335.85 net.

Leary's Appeal to the United States Circuit Court of Appeals, and Assignment of Error.

On March 22, 1918, the Learys appealed from the decrees of December 20, 1917, and March 12,

1918, and made assignments of error substantially the same as subsequently made on their appeal to this Court.

Decree of the Circuit Court of Appeals affirming January 20th, 1919.

The United States Circuit Court of Appeals, entered a decree January 20th, 1919, affirming the judgment of the District Court in all particulars (present Record, page 72). Its opinion is in the Record, page 66. The Court did not have exactly the same composition of judges as rendered the decree of November 30th, 1915.

Leary's Appeal to the United States Supreme Court.

On February 6th, 1919, the Leary's appealed to this Court (present Record, page 73).

Assignment of errors (Record, pages 74-75). The assignment of errors made are substantially, as follows:

(1) That the 1% Clerk's poundage under Sec. 828 R. S., should not have been deducted from the amount awarded the Learys.

(2) That Leary estate should have been allowed out of the general fund the costs, expenses and counsel fees, incurred on the intervention proceedings instituted in the Virginia suit.

(3) That the Leary estate should have been allowed out of the general fund the $591.46 paid by Mary C. Leary, Administratrix, to McClure for

fees and disbursements, in the proceedings in the Surrogate's Court.

(4) That the Court erred in holding that the balance of the fund belonged to the United States free from the claims of all other parties to the suit, whereas it should have held said balance was subject to intervenors' claims for the amounts specified in assignments (1), (2) and (3).

The United States Entered No Appeal.

The United States entered no appeal or cross-appeal, but waived no rights, or any of its contentions, as to want of power in the District Court to open up the case for proof on the merits beyond what was allowed by the mandate of this Court on final decree.

Mis-statement of the Facts made by Solicitors for Appellees in Their Brief.

In their brief, page 7, the solicitors for appellees in their statement of facts, say:

> "Moreover (c) the Trial Court *withheld* any payment to the Leary estate in addition to the aforesaid sum of $30,000, unless the Leary estate should accept the sum decreed in full satisfaction of its claims. This the Court did upon the insistence of the United States, and against the objection of the Learys" (Record, page 56).

This is a misstatement of the scope of the decree as well as of the purpose and intent of the Gov-

ernment's contention made before the entry of decree in the memorandum (Record, page 56). They elaborate their statement in the "conclusions in their brief, page 31. We call attention to it at this time, but will discuss the matter more fully under our *Point IX*.

POINTS.

I.

There was no error in charging the 1% clerk's poundage under Section 828 Revised Statutes on the total amount allowed intervenor out of the general fund.

Section 828 Revised Statutes provides as a fee to the Clerk:

> "For receiving, keeping and paying out money, in pursuance of any statute or order of court one per centum on the amount so received, kept and paid."

This charge is primarily a fee to the clerk chargeable against the fund so received, kept and paid out, the share of each person entitled to participate in the general fund being chargeable ratably in favor of the clerk. These payments to the clerk, like all payments to the clerk for fees, are subject to taxation as costs between the parties where costs are or can properly be awarded as between parties. Sec. 823, R. S.

Kitchen vs. Woodfin, 1 Hughes, 340 F. C., 7855.

Blake vs. Hawkins, 19 F. R., 204.

The question on the appellants' first assignment of error then comes back to the proposition that the Government should be taxed with a part of the intervenors' costs, as between party and party, and this notwithstanding that the Government is never taxable with costs as between party and party, and the provision of the original decree of Dec. 13, 1913, of the District Court directing that each party shall pay its own costs has never been disturbed by this Court or the Supreme Court.

Moreover, the action of the United States in bringing the stock into Court in 1903, and preserving the income arising therefrom, in view of the claims asserted by Kellogg hostile both to Leary and to the United States was a distinct benefit to the Learys, it is doubtful if they would have recovered a cent if the Government had not preserved it and the accumulated interest for five years before the Learys intervened. It was out of those accumulations that the first $30,000 was advanced to Leary. *Also the sale of the* $40,000 *par value of bonds and conversion into money and the payment of the proceeds to the Clerk was by a consent order*, and was a distinct advantage to, and for the express purpose of being able to apply the proceeds without delay to the Leary claim *pro tanto*. Ordinarily, where one suitor brings a fund into court, and another later, on a superior lien takes the fund, all the costs of the first suitor are chargeable against the whole fund.

> "It is a general principle that a trust estate must bear the necessary expenses of its administration."
>
> Trustees vs. Greenough, 105 U. S., 527.

In that case even counsel fees were allowed out of the fund to the party's counsel *who brought the fund into court*, as against those who come in and share in the proceeds of the fund.

There are so many different reasons why the decree in that particular is correct, it is unnecessary to argue this point further.

II.

The District Court after the mandate of the Supreme Court had no authority to open the case on petition, or otherwise as it did to take proof to establish an enlarged claim of the Learys for items now claimed as covered by the indemnity, beyond the specific claims stated in the intervention and relied on as proved at the final hearing on the merits.

While, in view of the final decree of March 12, 1918, no injury has been suffered by the United States, other than the payment of about $1,000 interest, and the delay and expense which has been occasioned to the United States, by Judge McDowell's allowing the intervenors to take evidence to try and establish that Leary had expended other items in defense of the action in the Circuit Court to establish Leary's liability, or for expenditures on the intervention suit, and because of the fact that Judge McDowell held that they had broken down in the proofs of those items,—still we insist that the District Court had no right to go into those proofs at all after mandate of the Supreme Court on final decree in the cause, and that therefore this Court will not on this appeal enter into

the question as to whether the $591.46 expended in the Surrogates' proceeding might have been recovered under the indemnity contract or not, nor will it inquire whether as an original matter the claim for expenditures by the Learys for attorneys' fees or other expenses in the conduct of the intervention matter, could have been charged against the stocks as covered by the indemnity. No such claim was set up in the intervention, and the intervenor went to final decree in the District Court on the specific claim of $40,802, with interest from December 31, 1910.

The attempt of the Learys to enlarge the claim for indemnity beyond what was claimed in their amended intervention, and beyond the amount proved at the trial on the merits, was evidently an after-thought which came to them, after the decree of the United States Circuit Court of Appeals of November 30th, 1915, that "the estate of Leary has established a claim to the stock in question which is superior to the claim of the United States" and reversed Judge McDowell's decree of December 13th, 1913, in that particular.

The Government having appealed from that decree to this Court, the Learys then indicated an intention to enlarge their claim, from that which they had established at the trial, and on their motion in this Court to dismiss the appeal took the position that the decree of the Circuit Court of Appeals was not final but interlocutory, and that they were free under that decree to make their indemnity claim anything they could prove, on return of mandate to the District Court. The position of the Government on that motion was that

the claim of Leary was definite and fixed by their intervention, and by the proof relied upon at the trial, to wit, the admission in the Government's answer of the $40,802 principal alleged to have been paid in December 10th, 1910, and interest from that date, and there was nothing for the court to do as between Leary and the United States but to pay that amount. That they could not again be heard to litigate the amount of the indemnity claim. This Court without opinion denied the motion to dismiss. A consideration of the character of the new claims of indemnity sought to be set up before Judge McDowell on return of mandate of this Court, will show that they were after-thoughts. They were:

(1) A claim of $591.46 for attorneys' fees, etc., paid January 10th, 1910, to David McClure by Mrs. Leary, administratrix, for defense of the proceedings in the Surrogates' Courts, to prevent collection of the judgment on the bail bond out of the estate (present record, page 41). There is no reason why this item of payment should not have been included in the amounts set up as the claim for indemnity in the amended intervention filed May 20th, 1913, in paragraph 13th and in the prayers for relief. The payments had been made more than three years before. There were other counsel for the Learys in the case then, and the indication is strong that Mrs. Leary, then administratrix, did not think it was worth while to make that claim, because probably she was advised by some one having the same opinion as the District Court or Circuit Court of Appeals now have that it was not within the indemnity contract.

(2) Another enlargement of claim for indemnity set up in the Leary petition of November 30th, 1917 (Second paragraph, present record, page 7), was to be allowed to make proof of expenditures of all sorts, attorneys' fees, disbursements, etc., made by the Leary estate in defending the bail bond suit. The bail bond suit had finally terminated in the judgment of April 6, 1908, for principal $35,347.15 and costs $30.31, making a total of $35,377.46, which with interest to date of payment, amounted to $40,802, which the 13th paragraph of the amended intervention averred was paid over to the United States December 31st 1910, and for which amount with interest from December 31st, 1910, the intervention made claim of indemnity. There is no reason why, if Leary had expended sums for counsel and disbursements in defendant the bail bond suit terminated more than six years before, such expenditures were not included in the statement in paragraph 13th of their amendment as to the amounts for which they claimed indemnity. Judge McDowell by his interlocutory decree of December 20th, 1917, allowed interveners to take depositions to prove any such disbursements (present record, page 21).

The actual taking of the depositions was avoided by the stipulations of counsel who together made an examination into the facts. That examination developed the fact that the Leary estate had expended nothing for attorneys fees or expenses in the defence of the bail bond suit in the United States Courts, but the same had been defended by Greene's attorneys at Greene's expense, and it was so stipulated by counsel on January 1st, 1918 (Present record, page 44).

Can there be a doubt that Mrs. Leary, administratrix, or her New York counsel, who furnished the facts of expenditures to set up in the amended intervention of May 20, 1913, was then fully apprised of the fact that the intervener had no claim for expenditures in the bond suit in the United States Courts? It was her duty to set up all her claims for indemnity then existing, or be barred, and she undoubtedly did so. After her death the substituted administrators succeeded in opening the case after mandate to take new proofs of expenditures, which when permitted, turned out not to have existed.

(3) The claim that the payment of the $40,802 was paid to the United States July 26, 1910, instead of December 31st, 1910, as had been averred in the intervention and admitted by the United States in its answer, was claimed to have been a clerical error in pleading, and Judge McDowell allowed proof to be taken by depositions as to that. This was avoided by stipulation as to the facts.

The fact developed was that the money due on the judgment was actually paid over to the United States District Attorney on July 26, 1910. The money was not then covered into the Treasury for reason indicated by the record. There was a judgment for $340.00 taxed in favor of the United States against Mrs. Leary in the Surrogate's Court (Present record, page 43). That payment was not made until December 31, 1910, for some reason not apparent, and then the whole was covered into the Treasury. That was doubtless the reason why the Leary intervention stated the payment of the $40,802, as of December 31, 1910. The Govern-

ment counsel made the admission in its answer based upon the covering of it into the Treasury (Present record, page 31) but in the post mandate proceedings stipulated that the records of the District Attorney's office show $40,802 was actually paid into court for the United States on July 26, 1910 (Present record, page 31). It is thus apparent that the averment of payment December 31, 1910, was not clerical error, but either mistake of rights or for some reason of extension of time to Mrs. Leary on the $340 which by reason of lapse of time and change of officers, could not be shown. Undoubtedly the claim of interest from July 26, 1910, instead of December 31, 1910, was due to a change of opinion of the substituted administrators from that of Mrs. Leary when she filed her amended intervention, as to her rights, and was an after-thought and not a clerical error. The solicitor for the United States never admitted the right of the court to allow new evidence to open up proof on the interest question, after mandate (Present record, page 56). The amount involved in the difference of interest was only about $1,000 and the Government indicated (Record, page 57) its willingness to waive it, but only on condition that the decree about to be entered by Judge McDowell should be accepted all round, and the litigation ended, which suggestion was not accepted by the Learys.

It was and is the contention of the Government that the District Court exercised no proper power in opening up proof on the question of interest after the mandate of this court on final decree, and erred in so increasing the amount of the interest award on the indemnity beyond the proof at the trial on the merits.

The question is not so important as to the amount of the item involved, as it is, on the proposition opening up new proofs after mandate of this court on final decree, and thus opening the door to an interminable succession of appeals and the tying up of distribution of assets indefinitely.

(4) The enlarged claim of the Leary estate set up in their petition of November 30, 1917 (Present record, page 6) to be allowed to make proof of all their expenditures in the intervention suit in Virginia as well by way of disbursements as for counsel fees paid and to be paid for intervener's counsel was also an afterthought, and not even suggested in the intervention or sought to be proved at the trial on the merits, as any part of the claim for indemnity. Attached to the petition is what is called a partial statement of such disbursements for such miscellaneous expenditures and for counsel fees paid. This statement shows that much of it had been expended prior to May 20th, 1913, when they filed their amended intervention. Many of the items consist of costs of the trial and Appellate courts in which the parties were adjudged to pay their own costs.

It is conceded now by the appellants that they cannot recover on the theory of recovering costs, but it is urged that all expenditures in the prosecution of the intervention suit are recoverable as part of the indemnity under the indemnity contract. If such a claim had been intended to be asserted at the trial on the merits, it was incumbent upon the intervenors to assert such claim on the trial on the merits. If they were not in position to make proof then of all these liabilities, it

was incumbent upon them to ask the court to give them time to make such proof, and the court might then have given such time, or they might have asked that if it went ahead to decree the court would provide at the foot of the decree for opportunity to the interveners to make proof of such additional counsel fees, etc., as they might be entitled to assert against the fund as indemnity if the court held their contract of indemnity had been established. They did nothing of this sort. They asserted no such claim. When now, after mandate on final decree, they seek to assert these enlarged claims without authority from the mandate and opinion of this court, the only inference which can be formed is that there has come over the present counsel for intervenors, a change of view since they went to trial on the merits before the District Court in December, 1913. Then they evidently were of the same opinion that has since been expressed by the District Court and Circuit Court of Appeals that such claims were not within the indemnity contract. Whatever their opinions then were, it was their duty then to have asserted such claim if it existed in some manner so as to have preserved their right if denied. Without the enforcement of that rule there can be no end to litigation nor to the number of appeals that can be brought up on appeal by the same party in the same case by trial of their cause of action in piecemeal.

The Opinion of the Circuit Court of Appeals on this Point, January 16th, 1919.

The Circuit Court of Appeals, in their opinion (Present record, page 66), affirmed the disallowances of enlarged claims which Judge McDowell had disallowed, upon consideration of them on the merits, but differed from the views of the solicitor for the Government on the point that it was too late to assert these enlarged claims after the mandate of this court on final decree. They say, page 69:

> "The second appeal turned on the question whether the evidence adduced was sufficient to prove an agreement to indemnify Leary, and whether the indemnity fund was represented by the Norfolk & Western stock. On this question the trial court ruled against the estate; but it was held on appeal as above recited that the estate had established a claim superior to the claim of the United States. There was no determination of the scope of that claim, for occasion did not arise to construe the indemnity contract in that regard. It was therefore proper for the court below to which the cause was remanded, to permit an amendment to the petition, or treat it as amended so as to include a claim which is but incident to the main demand of the intervention. We think it should be examined on the merits."

If that view of the decree of the Circuit Court of Appeals on the second appeals be correct, their decree as between the Leary's and the United States was purely interlocutory. But this court

had ruled that it was not interlocutory but final, on the Leary's motion to dismiss the appeal from it.

The fundamental error in the above statement of the Circuit Court of Appeals is this, that the reason why the opinions on the second appeal *did not turn* upon the scope of the claims is that the amount and details of the claim were definitely stated in the intervention and were admitted to be true in the answer of the Government, and no other relief was prayed against the fund except payment of that definite claim and interest from the time stated, and the parties went to trial on the merits of that definite claim, and final decree was entered upon it. There was no dispute as to it, and no occasion to discuss it in the opinion of the Appellate Court further than to state that the claim of the Learys was established. Nevertheless, if the definite extent of the claim had not been established at the trial on the merits, any decree which merely decided the question of sufficiency or insufficiency of proof of the indemnity contract, whether of the District Court or Circuit Court of Appeals leaving "the scope of the claim" undetermined, would be but interlocutory and not a final decree from which the appeal from the Circuit Court of Appeals to this Court could be taken.

In their brief filed on the hearing in this Court on the second appeal on the merits, in No. 194, Oct. Term, 1917, counsel for intervenors at pages 12-13, summing up the cases made by them on the merits stated, that the Intervention set forth that:

> "On September 10, 1903, the United States brought suit against Mary C. Leary, as administratrix of James D. Leary, in the Circuit Court of the United States for the Southern dis-

trict of New York upon said $40,000 bond, and on the 6th day of January, 1908, recovered judgment against her for the sum of $33,377.46, which said judgment, amounting with costs and interest to $40,802, was paid by the said administratrix to the United States on or about December 31, 1910. *The payment of this sum is admitted in the answer of the United Stat[illegible]* Rec. pages 75 and 84"
and she prayed for a decree to the effect that the Norfolk & Western Stock, together with so much of the accumulated dividends thereon, as might be necessary to repay the said sum of $40,802 with interest from December 31, 1910, be transferred and turned over to her. She also prayed for general relief."

We think that this question was decided by this court on the motion of the Learys and Kellogg at the October Term, 1916, of this court, to dismiss the Government's appeal, from the decree of the Circuit Court of Appeals of November 12th, 1915, on the ground that it was not final. The very contention afterwards made in the court below that interveners were entitled to enlarge their claim, was then set up in their briefs by interveners as showing the decree was not final but interlocutory, and therefore not appealable, and that contention was met in the Government's brief, by pointing out that the claim was definitely proved and relied upon on the trial, and it was too late to enlarge it. This court denied the motion and the case went to hearing and was disposed of on the merits, and this court in its opinion gave no right to the Learys to enlarge their claim of indemnity beyond that made on the trial on the merits.

Unfortunately, we did not have in the record before the Circuit Court of Appeals on the last hearing, as will be seen from the record, the fact that this court had specifically ruled that the Circuit Court of Appeals decree of November 30th, 1915, was a final decree.

There must be an end to litigation, and intervenors are subject to the same rule applicable to all litigants; they must set up all their accrued claims under a contract in their suit on it, and if they go to final trial on one claim, omitting others, they are forever barred, especially after final decree of the Appellate Court disposing of the cause. The Supreme Court did not reserve for them, as it did in the case of Kellogg reserve to the District Court the right to examine into and determine whether he was entitled to compensation as trustee.

> "It is well settled that where a party brings an action for a part only of an entire indivisable demand, and recovers judgment, he cannot subsequently maintain an action for another part of the same demand. Warren vs. Comings, 6 Cush., 103.
>
> Thus if there are several sums due under one contract, and a suit is brought for a part only, a judgment in that suit will be a bar to another action for the recovery of the residue."

Baird vs. *United States*, 96 U. S., 430.

In the case of *Hickman* vs. *Fort Scott*, 141 U. S., 415, the trial court rendered judgment for plaintiff for a certain amount, which on appeal the Supreme Court reversed with directions for certain items for which judgment had been given to be disallowed. On return of mandate, the plain-

tiff filed a petition in the court below praying to have the record amended "by allowing certain facts to appear, some of which findings were unavoidably and others accidentally omitted." * * *

> "The petition set forth the particular facts which it is alleged do not sufficiently appear in the findings, and prayed that the plaintiff might be allowed to make proof of them, and that the omissions and mistakes in the findings of fact herein stated be supplied and corrected, to the end that the record of said cause may be a true record before judgment is entered in pursuance of said mandate."

The petition was denied, and on plaintiff's appeal this court affirming the denial said:

> "The judgment was the one the court intended to enter, and the facts found were those only which the court intended to find. There is no clerical mistake. Nothing was omitted from the record of the original action which the court intended to make a matter of record. The case therefore does not come within the rule, that a court, after the expiration of the term, may by an order *nunc pro tunc* amend the record by inserting what had been omitted by the act of the clerk or of the court."
>
> "Nor is this a suit in equity to set aside or vacate the judgment upon and grounds on which courts of equity interfere to prevent the inforcements of judgments at law. It is simply an application by petition to a court of law, after its judgment has been reversed, and a different judgment directed to be entered, to so change the record of the original judgment as to make a case materially differ-

ent from that presented to the court of review.

The application derives no strength from the fact that it was by petition, and not by motion supported by affidavits We know of no precedent for such a proceeding as this, nor is there any principle of law upon which it could be based."

In *Dunton* vs. *Hepburn et al.*, 3 Wheat, 231, the Supreme Court on a previous appeal had directed the defendants to "make up, state and settle, before commissioners to be appointed by the Circuit Court * * * an account of the rents and profits" (of a certain tract of land) since the 27th day of March, 1809, and that they pay over the same to the complainants.

The commissioners reported that the defendants had not received any rentals after March 27, 1809, but that the rental value of the land was $2,077.60. The court below held that the direction of the previous mandate limited the recovery to any rentals or profits actually received from others, and that court had no right to vary from the specific direction, and the Supreme Court affirmed the correctness of that ruling.

In *Texas & Pacific R. Co.* vs. *Anderson*, 149 U. S., 237, the Supreme Court held:

"A Circuit Court of Appeals cannot review by writ of error the judgment of a Circuit Court of the United States, in execution of a mandate, and there are no proceedings subsequent, not settled by the terms of the mandate itself."

Mr. Justice Fuller for the Court said at page 241:

"The judgment was made final by the order of this Court, and was not again subject to be reviewed by the court below *in the exercise of its equitable* powers or otherwise."

In re *Sanford Fork & Tool Co.*, 160 U. S., 247, the Supreme Court said at page 255:

"When a case has been once decided by this Court on appeal, and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That Court cannot vary it, or examine it for any other purpose than execution; *or give any other or further relief; or review it, even for an apparent error upon any matter decided on appeal;* or intermeddle with it, further than to settle, so much as has been remanded."

It further said at page 256:

"But the Circuit Court may consider and decide any matters left open by the mandate of this Court; and its decision on such matters can be reviewed by a new appeal only * * * The opinion delivered by this Court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate."

In *Gaines* vs. *Rugg*, 148 U. S., 228, the Supreme Court granted a mandamus to compel the Circuit Court to enter a decree in pursuance of a mandate, conforming to the opinion, and varying only as to the particular matter left open.

In the former appeal in the case, the opinion of the Supreme Court had (as in the case at bar) stated (page 238) that the decree of the lower court was "reversed" and remanded "for further proceedings to be had therein in conformity with the opinion of this Court." It was ruled by the Circuit Court that this reversal left the case open for setting up new equitable defenses, and opened the whole case. But the Supreme Court said (page 238):

> "The mandate and opinion, taken together, although they used the word "reversed" amount to a reversal only in respect to the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance of it all other respects. * * * The opinion of this Court proceeded distinctly upon an approval by it of the action of the Circuit Court in respect to the title and the possession, and a disapproval only of the method of accounting."

Referring to the contention of the Circuit Court in that case that the direction in the mandate to the lower court to proceed not only "in conformity with the opinion and decree of this Court," but also "according to the right and justice," "and that therefore it had authority to permit the defendant Rugg to take further testimony in support of his exceptions by way of defense to the title to the lands in controversy,"—the Supreme Court said (page 240):

> "In other words, that the whole controversy was to be reopened as if it had never been passed upon by this Court as to the title and possession of the land. This cannot be allow-

> ed, and is not in accordance with the opinion and mandate of this Court."

In this same opinion at page 242 the Supreme Court cites with approval the case of *Washington & Georgetown R. R.* vs. *McDade,* 135 U. S., 554 in which it was held by them that where their opinion affirmed a judgment which did not specifically direct interest, it was error for the Court below to enter the judgment for principal and for interest from the original date of judgment, even if by law the judgment bore interest.

They cite also from In re *Washington & Georgetown R. R. Co.*, 140 U. S., 91, saying:

> "This Court held that it was the duty of the Court below to have entered a judgment strictly in accordance with the judgment of this Court, and not to add to it the allowance of interest; and that the language of the mandate of this Court, 'that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding' did not authorize the judgment of this Court."

These last cases are directly in point, on the question of the want of right in the Leary intervenors whose claim set up in their intervention was for the specific sum of $40,802 with interest from the alleged date of payment, December 31, 1910, which was admitted in the answer of the United States, and which constituted the Leary claim as averred and proved, to have accorded to them by a mere motion made on the day set for settling the decree on mandate, the right to take evidence to establish the fact that they had actu-

ally paid the money on July 26, 1910, and were equitably entitled to interest from July 26, 1910.

In *Latta* vs. *Granger*, 167 U. S., 81 (which was really a continuation of *Gaines* vs. *Rugg*, 148 U. S., 228), the Supreme Court quote from the former case as follows:

> *"The decree was beyond the control of the Circuit Court, unless on a bill of review* duly filed, and the time for filing a bill of review had long ago elapsed. The Circuit Court could do nothing to affect the decree, except in obedience to the mandate of this Court."

It further appears from the statement in the said case, 167 U. S., page 85, that after the mandamus was granted the Circuit Court appointed a master to state the account and to take testimony, etc. The Supreme Court said:

> "The master, however, instead of restating the account, corrected in the particulars indicated by us, proceeded to take new proofs as to rental value and the value of the improvements; and thereupon found the value of the improvements to be $2625, and cut down the rents to six dollars per front foot."

The report was approved by the Circuit Court, and the Supreme Court said (page 85):

> "In these proceedings in the Circuit Court there was error and its decree must be reversed."

The Government did not cross appeal from that part of the order which gave intervenor interest from July 26, 1910. We preferred to allow intervenors a free opportunity to take the amount decreed and we hoped for an end of the litigation, but it seems they are still not satisfied.

If we are correct in our view on this point, the decree of the District Court should be affirmed, irrespective of the merits of the question as to whether the $591.46 and also the expenditures for counsel fees, &c., by the Learys on the controversy with the United States over the fund in the Virginia suit, was within the terms of the indemnity contract or not.

III.

The indemnity contract went no further than an agreement to hold Leary harmless to the extent of the judgment for principal, interest and costs, which was rendered against him on the suit brought in the United States Circuit Court in New York, which when entered on January 6, 1908, legally and finally established his liability on the bail bond.

The gist of the contention of the solicitors for the intervenor and for Kellogg, is that because the stock in question was deposited with Kellogg as indemnity for Leary, that Leary or Leary and the trustee Kellogg, were entitled to be reimbursed and compensated not only to the extent of the money Leary might have to pay as security for Greene,

but also for every expense Leary might have to undergo in realizing upon the stocks whether such expense was occasioned by the act of the defendant Greene in contesting the Leary Claim, or whether from the assertion of adverse title to the stock by third persons, such as the United States or Kellogg himself (as he asserted a claim for fees in his original answer). Their position is that it is not a question of taxing costs as between party and party, nor as between attorney and client, but as to a contract right under the terms of the letter of December 14, 1899, to charge up everything against the 400 shares of stock, deposited for Leary's indemnity, which would bring Leary out whole at the end of this collateral contest of the United States over the title and ownership of the stock, which possible contest, according to the opinion of the Appellate Courts, was not even in the minds of the parties to the contract of December 14, 1899, at that time.

(Record, Second Appeal, page 145, and of this court, 245, U. S., 1).

The appellants now ask the Court to take an entirely different view of the indemnity agreement of December 14, 1899. They call upon the Court to read into it an agreement to indemnify Leary not only against the bail obligation, but against any claim which might be made by the United States or any one else against the pledged securities, whether those claims were sustained or not. If they had established such an agreement as that they would have had great difficulty in overcoming the presumption that they had notice of the defect

in Greene's title and of the claims of the United States.

The answer to that contention is primarily found in the legal construction of the terms of the letter of December 14, 1899. That letter is as follows:

"New York, Dec. 14, 1899.

James D. Leary, Esq.,

My dear Sir: Captain Benjamin D. Greene has placed in my hands, as indemnity to you for becoming his bondsman in the matter of the United States against Greene, Gaynor, and others now pending in the district court, three hundred shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company.

It is understood that I am to hold these until you are released from the said bond, or in case that your liability should be established, that it is to be applied in payment of your obligation. I am,

Yours truly,

L. Laflin Kellogg."

The subsequent letter of Kellogg of May 21, 1901, stating "it will be necessary to renew the bail given by you for Capt. Greene, and for which I hold the security for your protection * * * This new bond is to take the place of the old one without additional liability" emphasizes the fact that the security or indemnity was limited to the

liability which might be adjudged to Leary on the bail bond.

> "In a broad and general sense indemnity is that which is given to a person to prevent his suffering damages."
>
> 22 Cyc., 79.

Contracts of indemnity, however, necessarily consist of three elements—the statement of an intent to indemnify, a specification of the act which the indemnitee is to perform, and the extent to which he is insured from injury arising from the act.

The intention of the parties derived from the language used necessarily must limit the extent of the indemnity.

> 22 Cyc., 84.
>
> "The extent of the condition of an indemnity bond may be restrained by the recitals, although the words of the condition import a larger liability than the recitals contemplate."
>
> 22 Cyc., 85.

Citing a large number of outhorities.

In *Luddington* vs. *Pulver*, 6 Wend., 404, it was held (headnote):

> "A bond reciting a conveyance of land, and covenanting to indemnity and save harmless the obligee against all action brought for the recovery of the land, and against all costs

and expenses in consequence, is an indemnity only against all *lawful* claims, and the breach assigning the bringing of a suit without alleging title in the party prosecuting, will not give a right to recover."

In that case, Marcy, Justice, said (page 406):

"A covenant to save harmless against the claims and demands of all persons, has been too often decided not to extend to *tortious acts,* for us to alter the construction of it. The authority for this construction is taken from the year-books, and courts have adhered to it down to the present time."

He quotes from Lord Ellenborough in *Nash* vs. *Palmer,* 5 Maude & Selw., 374, as follows:

"* * * As regards such acts as may arise from a rightful claim, a man may well be supposed to covenant against all the world; but it would be an extraordinary extension of such a covenant, if it were good against all acts which the folly or malice of strangers might suggest, and therefore the law has properly restrained it within its reasonable import."

Marcy, Justice, further said (page 407):

"The authority of these cases must prevail over any speculations as to the intent of the parties, founded only on the comprehensiveness of the language used by the obligor."

In the case at bar, we have:

(a) The statement that the stocks were deposited with Kellogg as indemnity,

(b) for Leary's becoming bondsman for Greene,

(c) with the understanding that if Leary was released from the bail bond, the stocks were to be released from Leary's claims—

(d) or in case Leary's liability should be established, that the stock is to be applied in payment of Leary's obligation.

There is not even a statement that if Leary was discharged on the bail bond, or successfully defended suit on the same, he should be reimbursed for expenses out of the fund.

It is clear that the "obligation" to which the stocks were to be applied in payment, was the "liability" which should or might be established against Leary on the bail bond.

It is clear that the purpose and extent of the indemnity being specified to be to the extent of holding Leary harmless to the amount of the liability which should be "established" against him, on the bail bond, and nothing else being specified, necessarily the extent of Leary's liability established on the suit on bail bond, fixes the extent of the liability under indemnity agreement on the stock, if the terms of the contract are to control. It was expressly made mere counter-security to Leary for his obligation on the bail bond.

The right of Leary to recover the costs adjudged in that suit is not disputed because it was part of the liability established on the bail bond. Also Leary's right to recover interest on the amount paid out by Leary on that judgment as set up in his intervention and proved at the trial on the

merits, is not disputed—he was entitled to have the amount paid out of the security at the time he paid it, and as that fund left in court has been earning dividends, equitably he is entitled to compensation as interest out of that fund for the delay, until the final decree awarding it to him.

It may be stated as a general principle that in all cases where contracts of indemnity for counter-security is given, interest on the amount paid can be recovered against the indemnitor.

22 Cyc., 88.

This concession of Leary's right to recover the full amount he paid out on the judgment on the bail bond with interest, in no way concedes that the indemnity extended beyond the liability arising on the bail bond.

Indeed, the indemnity contract in this case follows the terms and limitations which by construction the courts invariably put upon indemnity contracts given to a person as counter-security to protect against an obligation assumed by such person, liability on the one measures the liability on the other.

In *Springs* vs. *Brown et al.*, 97 F. R., 405, Simonton, J., held (headnote):

> "Where a bond is given to a surety for the expressed purpose of counter-security against the liability assumed by him, the liability of the maker thereon is commensurate with the liability of the surety."

In *Philadelphia, Wilmington & Baltimore R. R. Co., Howard*, 13 How, 307-343, after commenting upon the fact that the nature of the indemnity con-

tract is to be determined by the manifest intent of the parties, Mr. Justice Curtis, for the Supreme Court of the United States, said:

> "When the parties have shown an intent to provide a fund for indemnity merely, the legal as well as the just result is, that after indemnity is made and the sole purpose of the fund fully executed, the residue of it shall go to the person to whom it equitably belongs."

In *Keesling* vs. *Frazier*, 119 Ind., 185, it was held:

> "A contract whereby A agrees with B, that in consideration that the latter will enter into a recognizance as surety for the appearance of C to answer a criminal charge, A will indemnify B for any loss he may sustain." • • •
>
> "The measure of recovery • • • on the indemnity contract is the amount of the recognizance and the costs made in taking the judgment thereon, with six per cent. interest from the date of the payment of the same by B."

In *Davis* vs. *Smith*, 79 Me., 351, the defendant agreed in writing to indemnify and save the plaintiff harmless in consequence of his paying over to her a certain $231 note. A third party sued and recovered from plaintiff on the note together with costs of suit. Plaintiff then paid the judgment for principal and costs, and brought suit against the indemnitor. It was held (page 362) that the measure of plaintiff's right to recover against the

indemnitor was "the judgment rendered and costs legally taxable against him in that suit and incident to that judgment."

IV.

In no event can the expenses paid out by intervenors, in the collateral contest arising out of the equitable title set up by the United States, be considered as expenses against which Leary was indemnified on Greene's contract with him.

It is a mere coincidence that the United States was the obligee of the bail bond or bonds referred to in the indemnity contract, and that the United States subsequently set up an independent title to the stocks pledged as indemnity. Leary's claim to indemnity out of the stocks on the contest against the equitable title asserted by the United States, in its legal aspect, would be no different if the deposit of the stocks had been to indemnify Leary as surety on a bond given to the State which Leary had been compelled to pay. In such a case it could not be contended that the parties had in mind that the indemnity was to be extended to expenses which Leary might be occasioned by an unsustainable equitable claim to the stock which the United States might thereafter assert. And so the Appellate Courts in the case at bar both agree that at the time of this indemnity contract Leary and Kellogg had no notice that the United States had a claim to the pledged stock.

It cannot therefore be successfully contended that the indemnity agreement was intended to indemnify Leary against any claim of title to the stock which might be asserted by the United States, but only as against the liability of Leary which might be established on the bail bond.

It is suggested by intervenors' counsel that a grantor for value by implication of law, warrants to the grantee that he has good title. This states the rule too broadly. Implied warranty in cases where warranty of title is implied, merely warrants that the title transferred will be good in the hands of the transferee against the claims of the transferror and outsiders "and not that the title will not be disputed."

35 Cyc., 416.

Leary's title acquired from Greene has been adjudged to be superior to that of the United States in the contest with which these expenses have been incurred, and therefore they cannot be recovered as a liability of Greene's indemnified against. They could not be recovered against Greene on the alleged implied warranty of title.

Judge McDowell very effectively answers appellants' contention on authority in his opinion (present Record, pages 23-24).

The leading cases in the State Courts, seem to establish that unless the indemnity contract expressly makes it clear that indemnity was intended to cover costs and expenses occasioned by contests made by strangers to the indemnity agreement, asserting title to the subject matter, such costs and expenses will not be construed to be within the perview of the indemnity contract.

In *Bancroft* vs. *Abbott*, 3 Allen (85 Mass.), page 424, the Court held:

> "At the time of the execution of a deed of warranty of land, and as a part of the same transaction, a third person executed and delivered to the grantee a bond, reciting the deed and providing that if the grantor therein should 'fulfill the terms of his covenants' therein and 'pay and discharge any and all claims which any and all persons shall have' upon the land conveyed 'so that the title in said premises shall ever be perfect' in the grantee, and the grantee 'shall be kept harmless and indemnified from all expenses in defending said title' then the bond should be void, but otherwise in force. Held, that the bond was only collateral security for the performance by the grantor of the covenants in the deed, and did not bind the obligor to pay expenses incurred by the grantee in defending his title against a groundless claim."

The Court said:

> "The clear intent of the parties was, that the grantee was to be kept harmless only from the failure of the grantor to fulfill his covenants in the deed, and to pay all lawful claims which any persons might have on the estate. It would be giving a very broad construction to the language of the instrument to hold that it imposed on the obligor a liability to pay the expenses and costs of any and every suit however groundless, which might be brought

against the grantee at any time subsequent to the deed, in which the title to the premises might be drawn in question."

Again the Court said:

"To lead to the conclusion that the grantees intended to enter into a stipulation so unusual as that for which the plaintiff contends, the language ought to be clear and unambiguous, so as to leave no room for any other interpretation."

In *Curtis* vs. *Banker*, 136 Mass., 355, B executed a bond to A conditioned to reimburse A a certain proportion of such sum as A might be compelled to pay to the United States by reason of the liabilities to be assumed by A as surety of H for the faithful performance of his duties as a paymaster.

The Government brought suit against A, the surety on the bond, for a shortage in the paymaster's account; A defended but judgment was rendered against him for a less sum than sued for and for interest and costs (Judgment affirmed, *U. S.* vs. *Curtis*, 100 U. S., 119). A then paid this judgment, and brought suit against B, the indemnitor for the amount of the principal, interest and costs so paid, also for the expenses paid out by A in defense of the suit brought by the Government. It was conceded by the parties in the Supreme Court of Massachusetts, that the expenses paid by A in defense of the Government's suit, other than the legal taxed costs recovered by the Government and paid by A, could not be recovered against the indemnitor on the indemnity contract, but A could

recover "interest and legal costs they were necessarily compelled to pay in the action against them."

In *Brandt's Excr.* vs. *Donnelly,* 14 Ky. Law Reports, 819 (1892), a distributee recovered a judgment against a surety of an administrator for his distributive share of an estate wasted by an administrator, with interest and costs, all amounting to $3010.30, in which suit the surety paid out $230.45, attorneys' fees in defense, and $20 costs. The surety paid the judgment, then brought suit on that judgment against certain indemnitors (on an indemnity agreement which they had given him) for the $3010.30 and for said $230.45 attorneys' fees he had paid out in that defense. The indemnity agreement was against any loss, cost or damage legally incurred by reason of said suretyship. The Court said:

> "It seems certain enough that the legal or court costs, including the damages on affirmance of the judgment in the Appellate Court, are embraced in the language of the bond. These costs and damages are the precise liabilities against paying which the indemnities provided by obtaining this bond. * * * But the general rule seems otherwise when it comes to extraordinary costs, such as attorneys' fees, etc." * * *
>
> "In such cases it would seem that unless the indemnitor encouraged or directed a continuation of the defense by appeal or upon the whole case, such a course appeared palpably to his advantage, such extraordinary costs are not chargeable to him."

In *Richards* vs. *Whittle*, 16 N. H., 259, the plaintiffs had assigned to defendants a lease of a tavern made by one Eliphalet Richards to plaintiff; in consideration of which defendant by an instrument in writing, "promised the plaintiff to save him harmless in all respects from his covenants in said lease during the remainder of the term and to pay all rents the plaintiff had agreed to pay, and to discharge all liabilities that might arise to the plaintiff by virtue of the lease.

The lessor Eliphalet Richards, on action brought, recovered judgment against the lessee for certain rent which the assignee should have paid but did not. Other attaching creditors of the defendant contested the claim made by the plaintiff on the indemnity agreement on which contest costs accrued.

The Court held that on the indemnity agreement, "the measure of damages is the sum the defendants agreed to pay, with interest."

And in holding that costs created *by the opposition of the attaching creditors* to the indemnity claim, could not be recovered by the plaintiff indemnitee, on the indemnity agreement, the Court said:

> "Upon the covenant or agreement to indemnify the plaintiff cannot recover the costs, *because they have been occasioned by other parties* and have not grown out of the covenants in the case. The attaching creditors who defended are bound to see them paid."

In the case at bar the indemnity contract was expressly made one of counter security to the indemnitee for the liability which might be established against him on the bail bond; in the language of the letter of Kellogg to Leary on May 21,

1901: It was held as "*security* for your protection" for the renewal of the "bail given by you for Captain Greene."

Now, although the whole of the bonds deposited constituted the security to indemnify Leary against the liability which might be "established" against him on the bail, and until the amount of that obligation was established by the judgment, the whole of the stock might be considered as the trust fund as security, the instant that the judgment established the amount of Leary's obligation, the trust in favor of Leary under which the stocks were held by Kellogg, extended only to the amount established as Leary's obligation by the judgment, and the part of that fund necessary to satisfy that judgment.

This is one of the principal points covered by the decision of the Supreme Court of the United States in the *Whitney case*, 103 U. S., 103-104. There the whole property was pledged on mortgage as security for the debt to McCormick, yet on a contest for the fund between him and the bank, adjudged to be a junior mortgagee, the Court said that McCormick could recover against the pledged fund only his principal and interest, and not the costs created by the claim of the bank—That to award these costs out of the general fund would be to diminish the property rights of Whitney or of his creditors, and that Whitney did not defend. That the contest for the fund being between McCormick and the bank, the costs of the contest were to be awarded as between those two parties as against the bank, but not against the fund. In the case at bar by reason of the law, those costs cannot be awarded against the Government. This does not alter the fact that they cannot be charged upon

a fund belonging to Greene or to Greene's creditor, the United States. The Court will not indirectly charge against the United States costs which it may not directly so charge.

The argument of intervenors' counsel clearly concedes, however, that the right to recover expenses of the contest can only be sustained if at all upon the proposition that it was impliedly included in the terms of the indemnity contract, which contention we have disposed of.

V.

As between party and party no costs can be taxed against the Government, except where the case belongs to some exceptional class in which it is specially so provided by statute.

In *U. S.* vs. *Barker,* 2 Wheat, 395, Chief Justice Marshall for the Court said:

> "The United States never pay costs."

See also

> U. S. vs. Hooe et al., 3 Cranch, 73.

In *U. S.* vs. *Davis* (U. S. C. C. A., Eighth Circuit), 54 F. R. 147, the question arose under special provisions of the Tariff Act of June 10, 1890, and the Court said (page 153):

> "General statutes providing for the recovery of costs by the prevailing party have been

held not applicable to the state or national governments, the principal ground for this ruling being the fact that the government, in the absence of direct statutory authority, is not liable to be sued by its citizens."

They further say (page 153):

"In the decisions of the Supreme Court cited by the counsel for the government, it is held that costs are not recoverable against the United States, and this must be accepted as the rule, unless congressional legislation, since the date of these decisions, has subjected the government to a liability for costs in cases of this character."

It was there held that Act was intended as a substitute for the old proceeding of a personal suit against the Collector for illegal seizure, and that such costs as were formerly taxable against the Collector was taxable against the United States under that act.

In the *Matter of Chase et al.*, 50 F. R., 695, Judge Colt, in the Circuit Court, District of Mass., held that costs were not taxable against the United States even for customs cases under the act of June 10, 1890.

In *Pine River Logging Co.* vs. *United States*, 186 U. S., 279 (1901), the Supreme Court said (page 296):

"While the rule is well settled that costs cannot be taxed against the United States, the rule is believed to be universal, in civil cases

at least, that the United States recover the same costs as if they were a private individual."

Rule 24 of the Supreme Court (Vol. 222 U. S.) in Sections 1, 2 and 3 provide for taxation of costs against the losing party in that court, but in section 4 it is provided:

> "Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States."

Rule 31 of U. S. C. C. A., 4th Circuit, is in the identical language of Rule 24 of the Supreme Court.

Rule 23 of U. S. C. C. A., 4th Circuit, provides:

> "In case of *reversal,* affirmance or dismissal, with costs, the amount paid for the printing of the record, and the clerk's fees for supervising of the same, shall be taxed against the party *against whom costs are given.*"

Section 254 of the Judicial Code provides:

> "There shall be taxed against the losing party in each and every cause pending in the Supreme Court the cost of printing the record in such case, except when the judgment is against the United States."

In the case at bar the interlocutory appeal by Leary, administrator, from the order denying her

leave to intervene, was affirmed by the Circuit Court of Appeals and reversed by the Supreme Court, but neither of those courts awarded her costs in their opinions or by mandate.

Neither were any costs awarded on the last appeals by the Circuit Court of Appeals or Supreme Court. Certainly no such costs could have been awarded as between party and party under the rules and decisions heretofore cited.

VI.

The cases where solicitors' fees are taxable against a fund in court, for recovery or preservation of the fund, are only cases in which the beneficiaries of the fund may be considered as the clients of the solicitor, as where suit is brought by one party for himself and others and subsequently all apply for, or are given the benefit of the work of the first solicitor; or where a trustee brings action to recover or defends for his cestui que trust. In all such cases the taxation for solicitors' fees or expenses is against the fund recovered as between attorney and client, and not against the general fund out of which the trust fund is carved.

In *Adams et al.* vs. *Kehlor Milling Co. et al.*, 38 Fed., 281, Judge Thayer said (page 282):

"It is well settled that when, under a bill filed by one beneficiary in a trust, in behalf of himself and all other beneficiaries, a fund is recovered and brought into court for distribution, the court may tax a reasonable solicitor's fee as costs, and order it to be paid out of the fund *so recovered*. *Trustees* vs. *Greenough*, 105 U. S., 527; *Banking Co.* vs. *Petus*, 113 U. S., 116, 5 Sup. Ct. Rep., 387. This rule rests upon the ground that where one litigant has borne the burden and expense of a litigation that has inured to the benefit of others as well as himself, those who have shared in the benefits should contribute to the expense. In that class of cases it is customary to tax against the fund realized a fee in favor of complainant's solicitor, before any distribution is ordered. *But even this rule would not authorize* the court to tax the costs as between solicitor and client *against the defendants*. Defendants are liable for a fee of $20 taxed under Section 824, Rev. St. U. S. If any further fee is taxed, it must be taxed against a fund actually or constructively in the custody of the court for the purpose of distribution. * * * The parties who have so intervened have unquestionably been benefited by the litigation inaugurated by complainants in behalf of all unsecured creditors, and, under the rule announced in the case of *Trustees* vs. *Greenough*, *supra*, *they should contribute ratably* to the payment of a reasonable fee to complainants' solicitors."

In *Trustees* vs. *Greenough*, 105 U. S., 527-535, the Court said (page 538):

"The fee bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require. The fee bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in adition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties."

In that case one Vose, a mortgage bondholder of the Florida Railroad, brought a bill on behalf of himself and all other bondholders, against certain Trustees who were vested with the title of some ten or eleven million acres of land and with the duty of sales thereof, alleging frauds and seeking to remove the trustees and preserve and realize os the property.

The suit was successfully prosecuted and the property recovered for the benefit of all. The other bondholders came in and received the benefit of the litigation. The Court allowed counsel fees to complainant's solicitors out of the whole fund preserved for the bondholders, but disallowed personal services and private expenses. Nothing was allowed to the defendant trustees for solicitors' fees or otherwise.

In *Ryckman* vs. *Parking,* 5 Paige, 543, Chancellor Walworth said:

> "As between party and party, the counsel for the complainant has in no case a right to be paid extra counsel fees out of a fund belonging to a defendant, except where the counsel has been employed to obtain or create such fund for the joint benefit of both parties."

There is a limitation on the power of courts of equity in awarding costs out of a fund, which is thus expressed:

> "Courts of equity have power to charge funds realized from or preserved by litigation with costs and expenses of such litigation, *but to authorize the exercise of this power the litigation in which the costs and expenses were incurred must have been in promotion of the interests of those eventually found to be entitled to the fund."*

11 Cyc., 97.

In Georgia it was held that where intervening creditors by independent petition were successful in speeding up a decree for sale of property already in the hands of the Court and in the benefits of which service the other creditors participated, still the intervenors were not entitled to counsel fees out of the general fund, or out of the fund realized from the sale of such property.

Ober Co. vs. *Macon Constr. Co.,* 100 Ga., 635.
11 Cyc., 97, 28 S. E., 388.

VII.

In a case where there is a contest between claimants of a fund in court, the costs and expenses of such contest are not taxable against the general fund but is taxable if at all only as between party and party.

In *Hauenstein* vs. *Lynham*, 100 U. S., 483, an inquisition of escheat to the state was prosecuted by the Virginia escheator under which he sold real estate in Virginia, of an intestate citizen of Switzerland. The latter's foreign heirs intervened by petition for the payment of the proceeds to them, thus ratifying the act of the escheator in making the sale but not the escheat. Their claim was sustained. On the subject of costs and counsel fees to the escheator, the Supreme Court said (page 491):

> "During the argument here, our attention was called to the amount that might be taken from the fund with respect to compensation to the escheator and to his counsel in the event of our judgment being against him.
>
> Under the circumstances, he can have no claim as an escheator, but he may properly receive the percentage allowed by law for making sales of real property in ordinary cases. *It is a settled* rule in this court never to allow counsel on either side to be paid out of the fund in dispute."

In *National Bank of Genesee* vs. *Whitney*, 103 U. S., 99-104 (reversing 71 N. Y., 161) there was

a foreclosure of a mortgage in a state court, which after being satisfied left a surplus of $3800 in court, over which there was a contest between the bank, McCormick and other mortgagees. The Supreme Court of the United States held that the mortgage pledge to McCormick was superior to that of the bank and that as the claims of McCormick and the bank would exhaust the fund, it was unnecessary to discuss the claims of the other junior mortgagees. It decreed,—McCormick,

> "has therefore a right as against the bank to prior payment of the $1500 and interest, for which amount his mortgage was a lien upon the premises."

Thereafter McCormick petitioned to be allowed costs also out of the general fund pledged to him in addition to the principal and interest. The Supreme Court said:

> "The petition of McCormick to be allowed costs out of the fund in court must, according to the usual practice of the Court in such cases, be also denied. His costs are chargeable against the bank which contested his right to be paid out of the proceeds in court. If paid out of the fund they would reduce by their amount the moneys properly applicable to the indebtedness of Whitney."

This case is directly in point with the case at bar. Greene, the principal defendant, took no part in the contest, between the United States claiming the whole fund, and Leary claiming a large part

thereof. If there had not been any such contest of Leary's claim by the United States, Leary could only have had the principal and interest of the amount he paid on the bail bond refunded to him, and the surplus would have been Greene's, subject to the Government's claim against him, and Greene would have been entitled to have such surplus if taken from him by the United States credited on the claim of the United States against him for that much of the diverted trust fund. For this surplus over Leary's claim to be taken to reimburse Leary for his contest with the United States, would not only have the effect of taxing costs against the United States, but would be to charge the costs, expenses and solicitor's fees of that contest against the defendant Greene, and be violation of the express provisions of Section 823, R. S.

VIII.

The argument presented by appellant's solicitors that the suit on Leary's interventions, should have been regarded as a suit in which the Learys were preforming the duties of a neglectful trustee in holding and protecting a trust estate for the benefit of all the cestui que trusts, and entitled to reimbursement from the whole trust fund, is fallacious, and falls down with the facts.

(1) In the first place, the fund was brought into court by the suit of the United States setting up its

own claim against Greene and Kellogg. Considering the facts disclosed in the record of the Second Appeal, in regard to the rapidity with which the securities afterwards decreed to have been pledged for Leary's benefit, were being disposed of with Greene in flight to Canada, and Kellogg making personal claims on the stock that was left, there can scarcely be a doubt, that if the Government had not have corralled this stock and held it up for five years before Leary intervened and accumulated the dividends, afterwards awarded to Leary, the latter would not have received a cent on the indemnity. Indeed there were thousands of dollars of other stocks in the Leary pledge which Kellogg sold, as shown by the record, and either appropriated to his own fees or paid over to Greene. Leary has failed to go after or to recover any of these stocks.

(2) The intervention of Leary was not a suit to hold a trust fund or to preserve a trust fund for the benefit of cestui que trusts within the meaning of the cases in which such language is used. The fund was already held and preserved in court. There were no beneficiaries of the indemnity trust, save the Leary estate itself. Their intervention was a suit against Kellogg as their trustee, and against the United States, an adverse claimant to the fund, to have the fund in court so far as necessary, applied to the satisfaction of their individual claim as the sole beneficiary of that trust. They performed no service in preserving a general fund for the benefit of other beneficiaries, interested in the whole fund, and who came in to enjoy the fruits of their labor. In so far as their suit was against Kellogg as trustee, it was a suit to recover from

a trustee their own beneficiary interest in the fund, and not a suit by one beneficiary to restore a trust fund for the benefit of all beneficiaries, who might come in and enjoy the benefits. In so far as their suit was against the United States, it was a pure contest between two claimants of a fund, each of which were held by the Courts to have established equitable liens, the United States as holder of the oldest lien on the whole fund, and Leary as the holder of a younger lien to the extent of the indemnity pledge finally held to be an innocent purchaser without notice of the Government's claim and having therefore a superior lien, to the extent of the indemnity pledge.

The principle that a trustee who defends the title to the trust fund, is entitled to be reimbursed from the fund preserved, decided in *William* vs. *Gibbes*, 61 U. S., 555, and *Stull* vs. *Harvey*, 112 Va., 822, is not questioned, but has no application here. Intervenors were not trustees and their intervention was not of that nature.

The principle cited by appellants from 39 Cyc., 343, that:

> "Although the costs and expenses of litigation, outside of taxable costs, are generally allowable out of the trust estate only to the trustee, they may be allowed to one or more beneficiaries who successfully maintain an action to recover or preserve the trust property, *for the benefit of all beneficiaries*, under circumstances which would have entitled the trustee to reimbursement had he brought the action," (italics ours)

has no application here. The intervenor's suit was solely in their own interest, and for no others benefit, entitling them to charge such reimbursement on the whole fund in which the others were to enjoy the fruits of the suit, and therefore equitably should contribute. So also their citation from 39 Cyc., 342, to the effect that a cestui que trust making advances to preserve a general trust fund for the benefit of all the beneficiaries, is entitled to a lien on the whole fund for reimbursement, has no application here. For the benefit of what other beneficiaries of this trust fund, were these expenditures of intervenors claimed to have been made? Certainly there was no beneficiary of the fund for whose benefit they made expenditures other than themselves. The trust which existed in the United States, was adverse, and surely not benefited by the Leary suit. Instead of the Learys being entitled to reimbursement and counsel fees, the principles generally applied is that when a junior lien holder brings a fund into court and a senior lien holder comes in and claims the fund, he must take it subject to the accrued cost and expenses up to the time he intervenes, would, if applied, have resulted in an award to the Government of all costs and expenses up to the time of Leary's intervention in bringing in and preserving the fund.

IX.

The statement of appellant's counsel in their brief page 7 that the trial court in its final decree of distribution of March 15, 1918, withheld payment to the Leary estate of the amount decreed it, unless the Leary estate should accept the sum decreed in full satisfaction of its claim, and that this was done upon the instance of the United States, is a mis-statement arising from an erroneous view of the decree and of the position taken by the United States in its reply memorandum (Record, page 56).

The memorandum of the solicitor of the United States referred to was filed February 23, 1918 (Record, page 55), in reply to a memorandum of intervenor's counsel of February 20th, 1918, relative to the forms of decree which had been presented to Judge McDowell by the solicitors of the respective parties as conforming in their respective views, to his opinion. The solicitors for the intervenors submitted a form of final decree by which they were to be paid at once the full amount of their claim, as Judge McDowell had fixed it in his opinion, by which they were to get interest on the $40,802 from July 26, 1910, and providing in the same decree that the distribution of the balance of the fund which in the Judge's opinion had been held free from all claims of the Learys should be stayed and tied up in court, until the Learys should

elect, if they so decided, to prosecute an appeal from those parts of the decree with which they felt aggrieved.

In the reply memorandum submitted by the Government's solicitor, it was pointed out (Record, page 56) that the Government had objected from the beginning of the argument on December 1st, 1917, for settlement of the decree of distribution against the Court's opening up the case for taking new proofs, as to amount of interest claimed as indemnity, or other matters, after the mandate of the Supreme Court on final decree, and that the Government had not and did not concede the right of the Learys to interest from July 26th, 1910. That the Government did not concede that the fact that the District Court had opened up for proof these various questions on the merits, gave the right to intervenors to litigate them on the merits before the Supreme Court, whose mandate we considered precluded such opening of the case, and that the decree to be entered by the Court should leave the Government as free to appeal or accept the decree as directed by the Court as it left the intervenors.

At the same time, the suggestion was made that the Government was willing to accept the decree as outlined by Judge McDowell, provided it was accepted all round. What the solicitors for intervenors were trying to get the Judge to put into the final decree is sufficiently apparent by their own statement of it at page 31 of their present brief and from the statement in the Government's solicitor's reply memorandum above referred to.

It was the duty of the Court on final decree of distribution to make a clear cut decree defining the rights of the respective parties to the fund, as

well that which was to be paid out of the fund to intervenors in full payment, free from the claims of the Government, as that which remained for the Government free from the claims of the Learys.

Anything short of this would have been an interlocutory decree resulting probably in two or three more appeals. The Court did nothing more than this in the decree of March 15, 1918 (Present Record, pages 45-49). The Court did not direct that the check ordered drawn in favor of intervenor should be withheld, unless they accepted it in full payment, but left it to intervenors to decide for themselves whether to take the check, or whether they could do so, without estoppel as to appeal from the other parts of the decree with which they might feel aggrieved. It is a decision with which a distributee under every decree of distribution must make for himself. Intervenor did not ask to withdraw from the fund only the amount to which the Government's contention applied that the amount awarded should be confined to the proof as made on the merits, as the claim stood on mandate, but asked for the full amount awarded by Judge McDowell in his opinion, and that the decree itself should provide that they could take that amount on account "without prejudice to the right of the Leary estate to appeal from so much of the decree, as it was advised was erroneous."

Such a provision in a final decree, without consent of all parties would be novel, and we think beyond the power of the Judge to make. The general rule is that the acceptance of so much of the sum decreed in distribution as covers amounts not in controversy, will not estop a party from appealing from other portions of a decree.

But a party cannot expect to get interest on a fund left by him in court when he fails to ask for leave to withdraw the part which is not in dispute, and asks to withdraw a greater amount. The contention of appellants, on this head we apprehend is made for the purpose of recovering interest from the general fund on the fund awarded them by the lower Court and which they have apparently allowed to remain there. They have been long apprised of the fact that the time for the Government to appeal has elapsed without appeal. Apparently they hope to get a reversal on some one or other of the points contended for, and then claim interest on the money they have allowed to remain there out of the balance of the fund. To this, of course, we would strenuously object.

The decree of the court below should be affirmed unless the court should feel that it should go further and disallow the item of interest from July 26 to Dec. 31, 1910, added by proofs taken subsequent to mandate in protection of its own jurisdiction.

Respectfully submitted,

MARION ERWIN,
Special Asst. to the Attorney General,
Solicitor for The United States Appellee.

LEARY ET AL., ADMINISTRATORS OF LEARY, *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 314. Argued April 30, 1920.—Decided May 17, 1920.

L went bail for G in a federal prosecution, upon an understanding that a fund standing in certain securities should be held for his indemnification, and not knowing that it represented moneys of which G had defrauded the United States through the crimes charged in the indictment; and, upon G's default, suffered judgment on the bond, which was paid by his estate. (See *s. c.* 224 U. S. 567; 245 U. S. 1.)

Held: (1) That since the duty to pay the judgment was absolute, L's estate was not entitled to be reimbursed out of the fund for the expense of defending against proceedings by the United States in the Surrogate Court to secure payment of its judgment. P. 95.

(2) That, since the upholding of L's claim of indemnity against the United States could not have been contemplated in L's agreement and he have the status of *bona fide* purchaser upon which his paramount equity depended, the expense of establishing and protecting the claim in the suit by which the Government impounded the fund could be charged against the fund only as costs, which would be inadmissible, the United States not being liable to costs directly or indirectly. P. 97.

(3) That, in allowing L's estate the amount paid on the judgment on the bail bond, with interest, the District Court properly deducted the clerk's poundage of 1 per cent. under Rev. Stats., § 828. P. 95.

257 Fed. Rep. 246, affirmed.

THE case is stated in the opinion.

Mr. Aubrey E. Strode, with whom *Mr. J. T. Coleman, Jr.*, was on the brief, for appellants.

Mr. Marion Erwin, Special Assistant to the Attorney General, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

The United States brought a bill to charge Kellogg with a trust in respect of funds received by him from Greene and obtained from the plaintiff by Greene through his participation in some well known frauds. In 224 U. S. 567, the representative of Leary was allowed to intervene and to assert a paramount claim upon the funds. In 245 U. S. 1, it was established that the funds were held by Kellogg primarily as security to Leary against his liability upon a bail bond for Greene. The United States having obtained a judgment on the bail bond and the same having been paid by the Leary estate the present appellants filed a petition in the cause, in the District Court, to have the funds applied to the reimbursement (1) of expenditures in defending against proceedings in the Surrogate Court to secure payment of the judgment, (2) of expenditures in establishing and protecting the trust; and (3) of the sum of $40,802, the amount paid on the judgment, with interest from July 26, 1910, the date when the judgment was paid. The District Court allowed the last claim with interest at six per cent., less the clerk's poundage of one per cent. under Rev. Stats., § 828. (The details are immaterial.) It denied the other claims, and its decree was affirmed by the Circuit Court of Appeals. 257 Fed. Rep. 246. 168 C. C. A. 330. Leary's administrators appealed.

The only reason suggested for the claim on account of defending against proceedings on the judgment is that the United States in the present suit had impounded the funds available for payment. But the obligation to pay the judgment was absolute, not confined to a payment from these funds, and the claim for the cost of resisting it has no foundation. We also are of opinion that the deduction of poundage by the clerk was proper as in other

cases of money kept and paid out by him. But it is said that this item and the expense of defending the trust should be borne by the residue of the funds in the clerk's hands after deducting the amount paid in respect of the judgment. It is argued that the trust informally established by letters of Kellogg stating that he held it for Leary's protection to be applied in payment of his obligation in case it should be established, if construed with reasonable liberality, must embrace these elements to make the protection complete. Of course the upholding of Leary's claim against the United States was not contemplated in the terms of the trust because Leary's ignorance of the interest of the United States was essential to the validity of his position as a purchaser without notice. But it is thought that indemnity includes defences of the indemnifying fund against unexpected attacks, that if the trustee fails to make it the *cestui que trust* may do so, and that in either event the fund should be charged. It does not matter that the United States is the opposing party, as its rights in the fund are inferior to those that Leary now has successfully affirmed. *Trustees* v. *Greenough*, 105 U. S. 527.

To these arguments the Government replies in the first place that they come too late; that the decree of the Circuit Court of Appeals that was before this court on the last occasion was treated as a final decree, which therefore fixed the amount that the appellants could recover beyond enlargement, and that as the prayer of the appellants was only for the transfer of so much of the fund as would pay the judgment on the bail bond with interest, nothing more can be asked now. This objection might raise difficulty if otherwise our opinion were in favor of the appellants; but as we think that the Circuit Court of Appeals was right with regard to the merits, we will assume for purposes of decision that the previous proceeding did not so precisely determine the appellants'

rights as to prevent their demanding the foregoing items as incident to the claim allowed.

To charge the fund with these expenses is to charge the United States, and it begs the question to say that the United States in this respect is subordinate to the Leary claim. It is not subordinate unless Leary's costs ought to come out of the Government's pocket, even though limited to particular money there. The Government cannot be made to pay or to take subject to the deduction, because Leary, even though a *bona fide* purchaser, had no contract for it, and because to charge the fund apart from contract is merely a round-about way of saying that the owner of the fund must pay charges of a kind that the United States never pays; (see *National Bank* v. *Whitney*, 103 U. S. 103, 104; *United States* v. *Barker*, 2 Wheat. 395;) and charges for protecting the fund not for but against the United States.

Decree affirmed.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.